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Supreme Court, U.S.
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Supreme Court of the
United States

Term: October 1989

Thomas V. Cassidy, Appellant-Petitioner,	]	Petition For Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit
-vs-	]	
United States of America, Commissioner of Internal Revenue, Appellee-Respondent.	]	

PETITION FOR WRITE OF CERTIORARI

==========

Appellant-Petitioner,
Pro se.
Thomas V. Cassidy
2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
404/237-0494

ONE

QUESTIONS PRESENTED FOR REVIEW

I.

In this case the U.S. court of appeals for the 7th circuit has rendered decisions on the same matter in conflict with decisions of another U.S. court of appeal of the eleventh (11th) Judicial Circuit *[887 F.2d 1541 (11th Cir. November 13, 1989)]* and other U.S. Federal courts of the 10th Judicial Circuit *[94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989)]* on the issue of the dischargeability of federal tax penalties and deficiencies *[11 U.S.C., sec. 523 (a) (7) (A) (B)]* associated and related to taxing years which preceded the filing of bankruptcy petitions by more than three (3) years.

II.

In this case the invoking *sua sponte* by the U.S. 7th Circuit court of appeals of a vague, arbitrary and aimless guideline doctrine it calls "judicial estoppel" without *stare decisis* or *precedent* to make a final and ultimate decision of fact, when by the U.S. 7th Circuit court of appeals' own concession that the issue of dischargeability was never "actually litigated" and the taxpayer has never had a trial on the merits of either dischargeability or fraud and that such a finding by the Tax Court is neither "res judicata" or "collateral estoppel" under the law or the Tax Court's Rule 90(f) or F.R.A.P. 36(b) constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and

has decided an important question of the federal law of judicial estoppel which has not been, but should be, settled by this Court.

III.

On March 13, 1984 by final order of the U.S. Bankruptcy court Respondent, Internal Revenue Service, creditor's claim, without its objection or its request to determine dischargeability although ordered to do so by the court, was finally discharged as a matter of law and Respondent was paid all of the disposable distributive assets of the bankrupt's estate. If the contrary is true then Petitioner has been denied his procedural and substantive granted and guaranteed rights of due process by Article V, Const. of the U.S. and the U.S. 7th Circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

TWO

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2. Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987)

3. Judgement and Opinion: U.S. District Court, Central District of Illinois
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4. In Re Cassidy, 892 F.2d 637 (7th Cir. 1990)

FOUR

JURISDICTIONAL GROUNDS STATEMENT

The jurisdiction of this Court is invoked as follows:

(a). January 4, 1990 is the date of the entry of the judgment sought to be reviewed.

(b). February 5, 1990 is the date that the 7th Circuit court of appeals denied Appellant-Petitioner's timely filed FRAP 40 and 7th Circuit Rule 40 Petition For Rehearing.

There are no extensions involved in this appeal.

(c). *28 U.S.C., sec. 2101 (c)* is believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

FIVE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Article V, U.S. Constitution:

> *"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "*

2. 11 U.S.C., sec. 523,(a)(7)(A)(B):

> *(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --*
>
> *(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty --*

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition. (Emphasis added)

3. 11 U.S.C., sec. 727 (a), (b), (c)(1) and (2):

(a) The court shall grant the debtor a discharge . . .

(b) . . . a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order of relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen

before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based upon on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee or creditor may object to discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of the discharge. (Emphasis added)

4. U.S. Tax Court Rule 90(f):

> Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding. (Emphasis added)

SIX

STATEMENT OF THE CASE

The basis for federal jurisdiction in the courts of first instance are:

(1). U.S. Bankruptcy Court for the Central District of Illinois: U.S. BKR. CT. RULE 4007(a); 28 U.S.C., sec. 157(b)(2)(I).

(2). U.S. District Court for the Central District of Illinois: U.S. BKR. CT. RULE 8001(a); 28 U.S.C., sec. 158(a).

(3). U.S. Court of Appeals for the Seventh Circuit: 28 U.S.C., sec. 158(d).

On June 24, 1980 the Appellee-Respondent, United States of America, Commissioner of Internal Revenue (hereinafter referred to as "Internal Revenue Service") sent Appellant-Petitioner, Thomas V. Cassidy (hereinafter referred to as "Cassidy") a

notice of deficiency and additions to taxes for the tax years ending August 31, 1974, and August 31, 1975, in the amounts of $12,865. and $22,028. respectively. The Internal Revenue Service upon its usual and customary practice claimed that all or a part of the underpayment was due to fraud and, pursuant to sec. 6653(b) of the Internal Revenue Code of 1954, assessed civil fraud penalties of $11,774. for 1974 and $11,014. for 1975.

On September 24, 1980 Cassidy filed a petition with the U.S. Tax Court seeking a redetermination only of the deficiencies and additions to tax as determined by Internal Revenue Service.

Cassidy other wise timely filed his tax returns and paid substantial taxes for the years 1974 and 1975.

Before the tax court proceedings came to trial, the First National Bank of

Chicago, Illinois (hereinafter referred to as "1st Bank") filed an involuntary petition in bankruptcy against Cassidy on February 14, 1983, under Chapter 7, 11 U.S.C., sec. 701 et seq. 1st Bank has no interest in this present case or appeal and all of its rights against Cassidy have been fully and finally determined.

In response to 1st Bank's involuntary petition Cassidy immediately filed his motion for summary judgment which the bankruptcy court granted on March 30, 1983 and entered judgment in favor of Cassidy and against 1st Bank.

At this point in time the Internal Revenue Service was in no way involved in the proceedings instituted by 1st Bank and did not know of them.

1st Bank then took an appeal from the March 30, 1983 adverse judgment against it to the U.S. District Court, Central District of Illinois and the

district court, per J. Mihm, reversed the bankruptcy court's March 30, 1983 judgment in favor of Cassidy. Judge Mihm is the same judge who ruled adversely to Cassidy in this proceeding in the court below. (A. 25, 27) Cassidy then filed his notice of appeal to Judge Mihm's adverse ruling and thereby instituted that appeal to the U.S. 7th Circuit court of appeals. Due to the deflowering personal and business effects of all of this on Cassidy, he dismissed his appeal and filed his voluntary petition in bankruptcy on December 2, 1983 and the bankruptcy court entered on that date its Order for Relief pursuant to Cassidy's consent.

December 16, 1983 Cassidy filed his statement of financial affairs and schedules, and listed for the first time Internal Revenue Service's alleged claim.

The Internal Revenue Service was promptly served with process and twelve (12) days later on December 28, 1983 there was filed in the Tax Court by Joel Gerber, Acting Chief Counsel, Internal Revenue Service, a "NOTICE OF PROCEEDING IN BANKRUPTCY" which begins by stating: "The respondent [Internal Revenue Service] notified the Court [Tax] that pursuant to Bankruptcy Code, 11 U.S.C., sec. 362(a)(8), this Court should stay its proceedings with respect to the petitioner Thomas V. Cassidy".

These undisputed facts of record are contrary to what the U.S. 7th Circuit court of appeals states in its opinion Cassidy v. C.I.R., 814 F.2d 477, 479 (7th Cir. 1987):

> "On November 14, 1983, the (Tax) court issued a notice setting the case for trial on January 30, 1984. On January 3,

> 1984, the taxpayer [Cassidy] notified the tax court that he was the subject of an involuntary petition for bankruptcy under chapter 7. This involuntary petition had been filed on February 14, 1983 --almost a year before the taxpayer notified the tax court of its pendency."

After March 30, 1983 there was never pending a 1st Bank involuntary petition in bankruptcy anywhere.

December 22, 1983 the bankruptcy court entered its order setting the first meeting of creditors for January 22, 1984 and March 12, 1984 as the last day for any creditor to file his or its objection to the discharge or any creditor to file his or its complaint to determine dischargeability.

January 22, 1984 no creditors,

including the Internal Revenue Service, appeared for the first meeting of creditors.

March 12, 1984 no creditor, including the Internal Revenue Service, filed an objection to the discharge of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 727(a), and no creditor, including the Internal Revenue Service, filed a complaint to determine the dischargeability of a debt of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 523(c). This was contrary to and in wilful and knowing disobedience, by the Internal Revenue Service, to the bankruptcy court's order of December 22, 1983 in view of the Internal Revenue Service subsequent claim assertion.

March 13, 1984 the bankruptcy court entered its final order of discharge of the debtor, Cassidy, and entered its permanent injunction. 11 U.S.C., sec.

523. Cassidy never has waived the discharge of the alleged debt of the Internal Revenue Service, which would not relieve the Internal Revenue Service of the restraint against an attempt to collect imposed by the permanent injunction.

The bankruptcy court as a part of its final discharge order found:

> . . . that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court . . .

On April 13, 1983 the bankruptcy court entered an order lifting the automatic stay previously in effect so that the tax court proceedings to redetermine only the deficiencies and additions to taxes as determined by the Internal Revenue Service could continue.

January 29, 1986 the bankruptcy

court by its order distributed all disposable assets of the bankrupt's estate to the Internal Revenue Service.

In the tax court proceedings the Internal Revenue Service served upon Cassidy a request for admissions which Cassidy responded to. A dispute arose as to whether Cassidy's response was timely filed within thirty days. The Internal Revenue Service contended it was not and filed its motion for summary judgment predicated upon its theory, only, that the response to its requests were "filed" late and thus "deemed" admitted and that its prior determination of June 24, 1980 was correct as to deficiencies, pre-petition interest, additions to tax and fraud penalties.

The legislatively created Tax Court's jurisdiction is limited only to redetermine the accuracy or wrongness of alleged tax deficiencies.

- In order to preserve his record Cassidy in response to the Internal Revenue Service's motion for summary judgment filed his motion to dismiss averring his March 13, 1984 discharge of the Internal Revenue Service's alleged claim, and Cassidy, further, made his motion pursuant to Tax Court Rules of Practice 90(e) for permission to withdraw and\or modify his deemed admissions. Cassidy asserted that the presentation of the merits of the case would not be subserved thereby and the Internal Revenue Service failed to make any showing or satisfy the tax court that the withdrawal or modification would prejudice it in prosecuting its case or defending its case against Cassidy.

Of course, the tax court Judge denied Cassidy's rule 90(e) request to withdraw or modify his responses and

based on the "deemed" admissions summarily entered judgment in favor of the Internal Revenue Service and against Cassidy.

The tax court then made a finding of fact that Cassidy's reponse to the Internal Revenue Service's request for admissions were not filed within the thirty days after receipt by him, but such responses were filed by Cassidy but that the matters were "deemed" admitted and as such supported the Internal Revenue Service's prior June 24, 1980 notice of deficiencies and additions to taxes and such "deemed" admissions satisfied the Internal Revenue Service's burden of proof of Cassidy's actual intent to defraud.

At what point in time the Internal Revenue Service filed and served its requests to admit upon Cassidy and when they were received by Taxpayer was highly

suspect. The "Filed" or "Received" stamps in the clerk's office of the U.S. Tax Court was missing. As noted by the U.S. 7th Circuit court of appeals in Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987) at pages 477, 478: ***"Taxpayer received Commissioner's request for admissions before date copy was filed with the court . . . ".*** (Emphasis added)

Be that as it may, Cassidy never received a hearing in the tax court on the merits of the Internal Revenue Service's claims and his defenses. Nothing in this regard was ever "actually litigated".

The tax court in summarily ruling for Internal Revenue Service and summarily entering judgment in its favor and against Cassidy on all of Internal Revenue Service's claims defined its jurisdiction as extending only to issues

of redetermining deficiencies and tax additions and its jurisdiction did not extend to determining questions of collection of the tax or bankruptcy discharge. Cassidy v. C.I.R. Service, 51 TCM 784 (1986) at page 786: (A. 271)

> Moreover, the redetermination of an income tax deficiency . . . [by the tax court] . . . has 'nothing to do with collection [or dischargeability in bankruptcy] of the tax nor any similarity to an action for collection of a debt...' Swanson v. Commissioner [Dec. 33,742] 63 TC 1180, 1184 (1976). Accordingly, if there is any question as to the collectability of any income tax deficiencies . . . that question is beyond the jurisdiction of this Court. Graham v. Commissioner [Dec. 37,400], 75 TC 389, 399

(1980). (Emphasis added)

Cassidy then, through his attorney, appealed the tax court judgment against him to the U.S. 7th Circuit court of appeals [Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987)] on the sole issue of the correctness of the redetermination of the Internal Revenue Service's claims and whether a filed "deemed" admission satisfies, without a trial on the merits or the issue not having been "actually litigated", the Internal Revenue Service's burden of proof of actual intent to defraud by the taxpayer.

The U.S. 7th Circuit court of appeals affirmed the tax court and as dictum not necessary to its decision stated that the taxes were not discharged in the bankruptcy court due to Cassidy's fraud although the issues of dischargeability and fraud with actual

intent have never been "actually litigated" or tried on the merits any where in any of the courts below and the Internal Revenue Service, contrary to the bankruptcy court's order of December 22, 1983, never filed any objection to Cassidy's discharge or never filed a complaint to determine dischargeability of its alleged claims against Debtor-Cassidy.

The U.S. 7th Circuit court of appeals in its second Cassidy opinion *[Cassidy II]*, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), concedes that its language in its first Cassidy opinion *[Cassidy I]*, Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987), was dictum and not necessary to its decision in *[Cassidy I]* and that no "deemed" admission by Cassidy in the tax court case can preclude Cassidy from litigating the issue of dischargeability and actual intent to

defraud in the bankruptcy court.

> If this action is barred by earlier litigation, it must be on the strength of this Court's opinion in *Cassidy I*. But for a ruling to have preclusive effect, it must be necessary to the decision. [cites] . . . dicta [is] that portion of an opinion not entitled to the full weight usually given judicial decisions, including any portion not necessary to the outcome of the case. The portion of *Cassidy I* which concerned the dischargeability of the debt was, unfortunately, dicta.
>
> The Court of Appeals exists to review judgments, and consideration of issues outside the scope of the judgment below

must necessarily be dicta, as they cannot possibly be grounds either for approval or disapproval of the lower court's judgment. The Tax Court had no jurisdiction to consider whether Cassidy's tax debt was discharged in bankruptcy. Graham v. CIR, 75 T.C. 389 (1980). Bankruptcy cannot therefore have been grounds for either affirmance or reversal of the Tax Court's order and the *Cassidy I* court's discussion of it cannot have been necessary to its decision. It follows, then that collateral estoppel and res judicata are technically inapplicable to this case.

[Further]... judgments based on stipulated facts have no collateral estoppel effect as to the matters stipulated, especially

stipulations in tax cases. U.S. v. International Building Co., 345 U.S. 502 (1953).

... we hold that a judgment based solely on an admission made under Tax Court Rule 90 (or Fed.R.Civ.P 36) cannot be used to estop re(?)litigation of a factual question in a later proceeding. [*Cassidy II*, pages 640,641.] (Emphasis added)

After this affirmance by the U.S. 7th Circuit court of appeals of the tax court's judgment, Cassidy immediately, through his attorney, based upon the continuing jurisdiction of the bankruptcy court and taking his clues from decisions of various U.S. bankruptcy courts; U.S. Tax Courts; holdings by certain U.S. district courts and U.S. courts of appeals on the questions of res judicata

and collateral estoppel and Tax Court Rule 90(f) and F.R.A.P 36(b) filed his complaint to determine the dischargeability of the Internal Revenue Service's alleged claims in the U.S. Bankruptcy Court for the Central District of Illinois on November 17, 1987.

The Internal Revenue Service responded with a motion to dismiss on December 17, 1987 on the grounds of res judicata citing as its authority ***Cassidy I.*** Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987). On February 2, 1988 the bankruptcy court dismissed Cassidy's complaint to determine the dischargeability of the Internal Revenue Service's alleged claim upon the grounds of res judicata.

Cassidy then, through his attorney, immediately appealed that decision to the U.S. District Court for the Central District of Illinois. The district court

overruled the bankruptcy court's dismissal of Cassidy's complaint to determine dischargeability on the grounds of res judicata, but entered judgment for the Internal Revenue Service on the grounds of collateral estoppel on December 20, 1988.

Cassidy then, through his attorney, immediately appealed the district court's decision and judgment in favor of the Internal Revenue Service to the U.S. 7th Circuit court of appeals.

The U.S. 7th Circuit court of appeals (In Re Cassidy, 892 F.2d 637 (7th Cir. 1990)) in its January 4, 1990 decision and judgment overruled the bankruptcy court's decision and judgment in favor of the Internal Revenue Service on the grounds of res judicata; overruled the U.S. District Court's decision and judgment in favor of the Internal Revenue

Service on the grounds of collateral estoppel; held that its language in Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987) *[Cassidy I]* deciding that Cassidy's alleged tax liabilities were not discharged was not a holding at all but mere dictum and not necessary to its decision in *Cassidy I* and that since the issues of dischargeability of the Internal Revenue Service's bankruptcy claims and the issue of taxpayer's actual intent to defraud had never had a hearing on the merits or had never been "actually litigated" that Cassidy was not precluded by either res judicata or collateral estoppel from litigating these issues of discharge or actual intent to defraud in the bankruptcy court.

Then the U.S. 7th Circuit court of appeals in a pontiff hand washing exercise to get rid of Cassidy adopted its dictum in *Cassidy I* as its holding in

Cassidy II and invoked ***sua sponte*** for the first time in its ninty-four (94) year history, since it was ordained and established by the U.S. Congress in 1896, a doctrine it called "judicial estoppel" in order to affirm the judgment of the U.S. District Court for the Central District of Illinois in favor of the Internal Revenue Service as to Cassidy's complaint to determine dischargeability. [***See prior discussion under STATEMENT OF THE CASE and ARGUMENT et. seq.***]

Throughout it has always been Cassidy's position: 1. that the Internal Revenue Service's alleged claims were discharged in bankruptcy on March 13, 1984; and, 2. that Cassidy having never had a hearing on the merits or there never having been actual litigation on the issues of dischargeability or Cassidy's actual intent to defraud as to

the Internal Revenue Service's alleged claims that he was entitled to such a hearing.

This has never changed.

The Seventh Circuit Court of Appeals holds in ***Cassidy II***, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), in its invoking of "judicial estoppel" for the first time in its 94 year history at pages 641 and 642:

> Although, this court has never applied the doctrine (judicial estoppel), we have identified certain limitations on its application.
>
> It has been said that judicial estoppel applies only to positions on questions of fact. [cite] Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L. Rev. 1244, 1262 (1986).

We disagree.

> [We've] held that the estoppel may be applied only where a clearly inconsistent position is taken.
>
> A party is not bound to a position it unsuccessfully maintained.

Cassidy, through his attorney, filed his timely Federal Rule of Civil Procedure (Rule) 40 petition for rehearing which was denied by the original panel of judges of the U.S. 7th Circuit court of appeals on February 5, 1990.

Except for this appeal and request for review by writ of certiorari Cassidy has at all times in the court's below been represented by attorneys of record; paid their attorney fees for professional services performed and all costs.

So here we are, Your Honors, on this appeal to the United States Supreme Court with a request for this Court to review: conflicts between U.S. courts of appeal and other federal courts on the same matter; so far a departure by the U.S. 7th Circuit court of appeals from the accepted and usual course of judicial proceedings in invoking a vague, arbitrary and aimless guideline doctrine it terms "judicial estoppel", for the first time in its 94 year history, since established and ordained by Congress in 1896, without guidelines and assurances to prevent arbitrary use which without exception has the effect of turning a citizen out of the court house without a hearing, and which requires this Court's supervision, and additionally presents a question of federal law which has not been and should be decided by this Court; and the denial to Cassidy, and others so

situated, his United States Constitutional granted and guaranteed right to procedural due process and his substantive right of not having his property taken from him without due process of law.

SEVEN

ARGUMENT

I.

In this case the U.S. court of appeals for the 7th circuit has rendered decisions on the same matter in conflict with decisions of another U.S. court of appeal of the eleventh (11th) Judicial Circuit and other U.S. Federal courts of the 10th Judicial Circuit.

The U.S. 7th circuit court of appeals adopting the dictum of its decision in Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987) as its holding in In Re Cassidy, 892 F.2d 637 (7th Cir. 1990) holds as a matter of law in its later decision *[Cassidy II]* that Cassidy's fraud penalties, deficiencies and additions to taxes are not dischargeable pursuant to 11 U.S.C., sec.

523 (a)7(A)(B).

> This subsection allows tax penalties "imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition" to be discharged. 11 U.S.C., sec. 523(a)7)(B).
>
> Because the taxpayer's deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders them nondischargeable. Moreover, subsection 523(a)(7)(A) mandates that fraud penalties are nondischargeable.
>
> (480, 481). *(Emphasis added)*

and the U.S. 7th Circuit court of appeals in *[Cassidy II]* at page 641:

> It follows then, that collateral estoppel and res judicata are technically inapplicable to this case. (*Not "actually litigated",*

no trial on the merits and Tax Court Rule 90(f).)

Nevertheless, we hold (*judicial estoppel*) that Cassidy is barred from relitigating [*NOTE: never "actually litigated"*] the dischargeability of his tax debts. (*NOTE: Not "actually litigated", no trial on the merits and Tax Court Rule 90(f).*) (Emphasis added)

Converse to the 7th Circuit court of appeals in In Re Cassidy, 892 F.2d 637 (7th Cir. 1990) the U.S. 11th Circuit Court of Appeals in In Re Burns, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) discuss, decide and hold as follows:

[Petitioner] Burns contended that the plain language of section 523(a)(7)(B) provides discharge to

penalties relating to a transaction or event occurring more than three years prior to the filing of a bankruptcy petition.

These issues of statutory interpretation arise as ones of first impression in this Circuit.

Since the statute uses the disjunctive [11 U.S.C., sec. 523(a)(7)(a) and (B)], a tax penalty that does not qualify for discharge under one of the two aforementioned circumstances may still qualify under the other.

It is noteworthy that *Cassidy* does not engage in an analysis of the ambiguity, or lack thereof, in section 523(a)(7). Rather, the opinion casts its reliance on a Senate report (with which, for reasons that will be set forth infra, we must respectfully

disagree) without finding the predicate ambiguity for reliance on an extrinsic aid for interpretation.

"There is nothing in the code that says that if penalties do not come within the provisions of subsection (A) they cannot become dischageable within the provisions of subsection (B). Roberts v. Internal Revenue Service, 94 B.R. 707, 709 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989). The use of the disjunctive, without further qualification of either subsection, leaves no doubt that Congress intended to create two independent measures for the dischargeability of tax penalties.

The 7th Circuit court of

appeals in *Cassidy* treated this piece of legislative history as dispositive of the tax penalty dischageability issue. [cite] The fundamental flaw in this reliance lies in the text of the proposed legislation before the committee at that time.

We resolve the question of how to read the legislative history in a simple fashion: by reading the statute and taking it at face value.

Thus, as the Supreme Court has counseled in Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986) and other cases, in light of the compromises and changes, we can effect the will of Congress only by giving effect to the words of the statute.

> For the foregoing reasons, the decision of the district court on the issue of tax penalties is AFFIRMED; to wit, a tax penalty is discharged if the tax to which it is related is discharged or if the transaction or event giving rise to the penalty occurred more than three years prior to filing of the bankruptcy petition and tax fraud penalties associated with taxing years which preceded the filing of prior bankruptcy petition by more than three years were dischargeable. *(Emphasis added)* (Pages: 1541, 1542, 1543, 1544, 1545, 1546, 1551 and 1552)

The Internal Revenue Service In Re Burns, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) never petitioned the U.S. 11th Circuit court of appeals for a rehearing

either under F.R.A.P 40 or 35(b) and did not seek a review to this Court by writ of certiorari. 28 U.S.C., sec. 2101(c). If this does not amount to a judicial admission by the Internal Revenue Service it is a practical admission by the Service that a conflict on the same matter exists between United States courts of appeal and that the Internal Revenue Service positions as to 11 U.S.C., secs. 523(a)(7)(A)(B) are wrong.

Converse, also, to the 7th Circuit court of appeals in In Re Cassidy, 892 F.2d 637 (7th Cir. 1990) these United States federal courts have held with In Re Burns, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) on the same matter, namely, Roberts v. Internal Revenue Service, 94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989).

Both the United States Bankruptcy Court and District Court for the Northern District of Oklahoma rejected the U.S. 7th Circuit court of appeals in ***Cassidy***:

> The second exception (subsection B) [11 U.S.C., sec. 523(a)(7)(B)] to the general nondischargeability rule does clearly apply and does make the penalties in the instant case dischargeable. This subsection states without ambiguity or equivocation that penalties on taxes that are over three years old are dischargeable. Plain and simple.
>
> In the instant case the penalties in question clearly refer to transactions or events that happened more than three years prior to the filing of the

> petition and are therefore covered by subsection (B) and are dischargeable. (Emphasis added)

Upon his best information and belief Cassidy represents to this Court that Roberts v. Internal Revenue Service, 94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989) is presently on appeal to the U.S. 11th Circuit Court Of Appeals.

At no level in this case has Cassidy ever received on the issue of dischargebility a hearing or trial on the merits or has he been afforded to have had "actually litigated" this ultimate question of fact of dischargeability and fraud notwithstanding he has consistently and repeatedly asked for it as he again does, if, in fact, the three year older than petition-filing alleged tax liabilities are not as a matter of law discharged.

II.

In this case the invoking *sua sponte* by the U.S. 7th Circuit court of appeals of a vague, arbitrary and aimless guideline doctrine it calls "judicial estoppel" without *stare decisis* or *precedent* to make a final and ultimate decision of fact, when by the U.S. 7th Circuit court of appeals' own concession that the issue of dischargeability was never "actually litigated" and the taxpayer has never had a trial on the merits of either dischargeability or fraud and that such a finding by the Tax Court is neither "res judicata" or "collateral estoppel" under the law or the Tax Court's Rule 90(f) or F.R.A.P. 36(b) constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of

this Court's power of supervision, and has decided an important question of the federal law of judicial estoppel which has not been, but should be, settled by this Court.

This Argument, Point II, which is also the Second Question Presented For Review (Petition, pages 2 & 3, supra) is thoroughly discussed with citations by Cassidy-Petitioner on page 28 through 37 of Petition, SIX; STATEMENT OF THE CASE and will not again be covered.

However, these two (2) additions:

1. This Court's decision in Brown v. Felson, 442 U.S. 127, pp. 131 thru 139 (1979) is here relevant and material on the Constitutional need of the bankruptcy court to conduct hearings on the merits and to "actually litigate" ultimate issues; and,

2. It is now improper and without

legal basis to look back to the Tax Court proceedings and to penalize a party and deny him a hearing concerning substantial tax debts and penalties in the court of proper jurisdiction -- the bankruptcy court. The doctrine of "judicial estoppel" when properly invoked is based upon the proposition of preventing inconsistencies within the courts, which is not the case here. It is not a penal doctrine as the U.S. 7th Circuit court of appeals here applies it.

III.

On March 13, 1984 by final order of the U.S. Bankruptcy court Respondent, Internal Revenue Service, creditor's claim, without its objection or its request to determine dischargeability although ordered to do so by the court, was finally discharged as a matter of law

and Respondent was paid all of the disposable distributive assets of the bankrupt's estate. If the contrary is true then Petitioner has been denied his procedural and substantive granted and guaranteed rights of due process by Article V, Const. of the U.S. and the U.S. 7th Circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

With a regard to antecedent matters of fact concerning 1st Bank and its dismissed involuntary petition against Cassidy discussed on pages 15, 16 and 17 of this Petition, SIX, STATEMENT OF THE CASE, Cassidy filed his voluntary petition in bankruptcy on December 2, 1983 and the bankruptcy court entered on that date its Order for Relief pursuant

to Cassidy's consent.

December 16, 1983 Cassidy filed his statement of financial affairs and schedules, and listed for the first time Internal Revenue Service's alleged claim. The Internal Revenue Service was promptly served with process and twelve (12) days later on December 28, 1983 there was filed in the Tax Court by Joel Gerber, Acting Chief Counsel, Internal Revenue Service, a "NOTICE OF PROCEEDING IN BANKRUPTCY" which begins by stating: "The respondent [Internal Revenue Service] notified the Court [Tax] that pursuant to Bankruptcy Code, 11 U.S.C., sec. 362(a)(8), this Court should stay its proceedings with respect to the petitioner Thomas V. Cassidy".

After March 30, 1983 there was never pending a 1st Bank involuntary petition in bankruptcy anywhere.

December 22, 1983 the bankruptcy court entered its order setting the first meeting of creditors for January 22, 1984 and March 12, 1984 as the last day for any creditor to file his or its objection to the discharge or any creditor to file his or its complaint to determine dischargeability.

January 22, 1984 no creditors, including the Internal Revenue Service, appeared for the first meeting of creditors.

March 12, 1984 no creditor, including the Internal Revenue Service, filed an objection to the discharge of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 727(a), and no creditor, including the Internal Revenue Service, filed a complaint to determine the dischargeability of a debt of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 523(c). This was contrary to and in

wilful and knowing disobedience, by the Internal Revenue Service, to the bankruptcy court's order of December 22, 1983 in view of the Internal Revenue Service subsequent claim assertion.

March 13, 1984 the bankruptcy court entered its final order of discharge of the debtor, Cassidy, and entered its permanent injunction. 11 U.S.C., sec. 523. Cassidy never has waived the discharge of the alleged debt of the Internal Revenue Service, which would not relieve the Internal Revenue Service of the restraint against an attempt to collect imposed by the permanent injunction.

The bankruptcy court as a part of its final discharge order found:

> . . . that no complaint objecting to the discharge of the debtor was filed within the time fixed by the

court . . .

January 29, 1986 the bankruptcy court by its order distributed all disposable assets of the bankrupt's estate to the Internal Revenue Service.

The bankruptcy court's March 13, 1984 final judgment of discharge in favor of Cassidy and against the Internal Revenue Service became final on April 12, 1984. The Internal Revenue Service took no appeal to the United States District Court for the Central District of Illinois within the allotted time to stay the finality of the March 13, 1984 final judgment of discharge.

It was not until after the discharge judgment became final on April 12, 1984 that the Internal Revenue Service on April 13, 1984 received permission from the bankruptcy court and relief from its permanent stay order, which was a part of the final discharge judgment, to proceed

in the Tax Court for the singular and only purpose of determining the accuracy or error of its June 24, 1980 notice of alleged deficiencies and additions to taxes for the tax years of 1974 and 1975.

This action by the Internal Revenue Service did not stay the finality of the March 13, 1984 discharge judgment in favor of Cassidy.

The Internal Revenue Service's alleged claims are discharged as a matter of law. If not than due process as granted and guaranteed by the United States Constitution means nothing.

The U.S. 7th Circuit court of appeals has so far departed from this accepted legal principle in the course of these judicial proceedings as to call for an exercise of this Court's power of supervision.

****

Appellant-Petitioner Thomas V. Cassidy, pro se, requests that the writ issue.

Respectfully submitted,

THOMAS V. CASSIDY, Pro se.
Appellant-Petitioner on
Petition for writ of
certiorari.

2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
404/237-0494

Atlanta, Georgia
May 6, 1990

89-1734

FILED
MAY 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

Supreme Court of the
United States

Term: October 1989

Thomas V. Cassidy, Appellant-Petitioner	)	Petition For Writ of
-vs-	)	Certiorari To
United States of America, Commissioner of Internal Revenue, Appellee-Respondent.	)	The United States Court of Appeals For the Seventh Circuit

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APPELLANT'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appellant-Petitioner,
Pro Se.
Thomas V. Cassidy
2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
404/237-0494

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In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1121

IN THE MATTER OF:

THOMAS V. CASSIDY, Debtor-

Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.

No. 88 C 1108-Michael M. Mihm, Judge

ARGUED OCTOBER 3, 1989 -

DECIDED JANUARY 4, 1990

Before Flaum, Manion and Kanne, Circuit Judges.

FLAUM, Circuit Judge. The Commissioner of Internal Revenue charged that attorney Thomas V. Cassidy had filed fraudulent tax returns for the years

1974 and 1975. A notice of deficiency was sent in June 1980. Cassidy challenged the deficiencies in the United States Tax Court, but before the case came to trial a bankruptcy petition was filed against Cassidy in the Central District of Illinois. The Tax Court proceedings were automatically stayed. 11 U.S.C. Section 362(a). Cassidy was discharged from all dischargeable debts on March 13, 1984. 11 U.S.C. Section 727. The bankruptcy court issued an order on April 13 lifting the stay to allow the Tax Court proceeding to go forward. 11 U.S.C. Section 362(d).

Cassidy was uncooperative in the Tax Court proceeding. He refused to respond to discovery requests, failed to meet deadlines, and generally

delayed the proceedings. When the Commissioner sent a Request to Admit under Tax Court Rule 90 (equivalent of Fed. R. Civ P. 36), Cassidy did not respond within thirty days as required by the Rule. The matters asserted in the Request were therefore deemed admitted. Among the facts admitted by Cassidy's silence was the following: "Petitioner [Cassidy] fraudulently and with intent to evade taxes omitted from his income tax returns for the taxable years ended August 31, 1974 and August 31, 1975, a substantial portion of his gross income." Cassidy v. Commissioner, 51 T.C.M. (CCH) 784 791 (1986). Although Cassidy did not respond to the Request to Admit, he did file a motion for dismissal or summary

judgment based on his bankruptcy discharge.

The Tax Court denied Cassidy's motion, stating:

> We summarily denied petitioner's motion because petitioner's contention is on its face inconsistent with the explanatory memorandum attached to petitioner's Discharge of Debtor order and the April 13, 1984 order issued by the same bankruptcy judge lifting the automatic stay to permit this case to go forward in the Tax Court. Moreover, the redetermination of an income tax deficiency has "nothing to do with collection of the tax nor any similarity to an action for collection of a debt * * *." Swanson v. Commissioner, 65 T.C. 1180, 1184

(1976). Accordingly, if there is any question as to the collectability of any income tax deficiencies, which we doubt, that question is beyond the jurisdiction of this Court. Graham v. Commissioner, 75 T.C. 389, 399 (1980).

Cassidy v. Commissioner, 51 T.C.M. (CCH) at 786 n.3.

At trial in the Tax Court, Cassidy tried to avoid the consequences of his failure to respond to the Request to Admit by claiming that he had not received the Request until less than 30 days before the case was called for trial and that the facts should therefore not be deemed admitted. The Tax Court held an evidentiary hearing on that claim, and found that Cassidy "fabricated [his] testimony in an

effort to avoid the consequences of [his] continued deliberate disregard for his responsibilities in connection with the case." 51 T.C.M. at 789. The facts involved were deemed admitted under Rule 90(c).

On the strength of those facts considered admitted, the Tax Court held that there was a deficiency as stated by the Commissioner, and that the tax returns were fraudulent, occasioning "additions to tax" under 26 U.S.C. Section 6653(b) as a penalty.

Cassidy appealed to this Court. He challenged the Tax Court's ruling concerning the Request to Admit and also argued that the entire debt was discharged in bankruptcy. In Cassidy v. Commissioner, 814 F.2d 477 (7th Cir. 1987) (Cassidy I), we affirmed the

judgment of the Tax Court and ruled as follows (1) the tax debt was not dischargeable in bankruptcy; (2) the fraud penalties connected with the taxes were not dischargeable; (3) the finding that Cassidy had over 30 days to answer the Request to Admit was not clearly erroneous; and (4) the facts deemed admitted supported the penalty for fraud.

Cassidy then returned to the bankruptcy court with a Complaint to Determine Dischargeability under Bankruptcy Rule 4007. In response to the Commissioner's argument that the Seventh Circuit had already dealt with the question, Cassidy contended that the Tax Court had no jurisdiction to consider dischargeability, and therefore the Seventh Circuit's

comments were pure dicta with no preclusive effect. The bankruptcy judge granted the Commissioner's motion to dismiss on the res judicata effect of Cassidy I, stating that he would not second-guess the Court of Appeals.

On appeal to the district court, Cassidy advanced the same arguments. He was partially successful; instead of holding that Cassidy was barred by this court's view of dischargeability under res judicata, the district court held that Cassidy was barred under collateral estoppel by the Tax Court's factual finding of fraud, which dictated a finding of nondischargeability under 11 U.S.C. Section 523(a)(1)(C).

In this Court, Cassidy raises the same contentions. He also argues that

this Court erred in holding that the penalty portion of the debt was nondischargeable in Cassidy I.

DISCUSSION

The district court took what appears to be the most reasonable approach to the resolution of this case: the court can rely on the factual finding of the Tax Court that Cassidy acted fraudulently when he filed his returns, which collaterally estops any contrary contentions. That finding supports the conclusion that the debt was not dischargeable under 11 U.S.C. Section 523(a)(1)(C). This makes sense except for one matter not addressed by the parties or the district court: Tax Court Rule 90(f) states that

> [a]ny admission made by a party under this Rule is for the purpose of the

pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

According to the rule, the admissions from the Tax Court proceeding cannot be used in the bankruptcy proceeding. It follows that the judgment of the Tax Court on that factual issue, which is based solely on the admissions, cannot be a bar in this later proceeding.[1]

If this action is barred by the earlier litigation, it must be on the strength of this Court's opinion in Cassidy I. But for a ruling to have a preclusive effect, it must be necessary to the decision. See Rheinberger v. Security Life Ins. Co. of America, 146 F.2d 680 (7th Cir. 1944); Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d

329, 337 (3d Cir. 1985); Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 710 (8th Cir. 1982). United States v. Crawley, 837 F.2d 291 (7th Cir. 1988), defines dicta as that portion of an opinion not entitled to the full weight usually given judicial decisions, including any portion not necessary to the outcome of the case. The portion of Cassidy I which concerned the dischargeability of the debt was, unfortunately, dicta.

The Court of Appeals exists to review judgments, and consideration of issues outside the scope of the judgment below must necessarily be dicta, as they cannot possibly be grounds either for approval or disapproval of the lower court's judgment. The Tax Court had no jurisdiction to consider whether

Cassidy's tax debt was dischargeable in bankruptcy. Graham v. CIR, 75 T.C. 389 (1980). Bankruptcy cannot therefore have been grounds for either affirmance or reversal of the Tax Court's order and the Cassidy I court's discussion of it cannot have been necessary to its decision. It follows, then, that collateral estoppel and res judicata are technically inapplicable to this case.

Nevertheless, we hold that Cassidy is barred from relitigating the dischargeability of his tax debts. When he appeared before this Court in Cassidy I, he successfully argued that this court should address the dischargeability question. Now that he is unhappy with the final result, he has shifted his ground and argues that

the Cassidy I court should have ignored his plea to consider dischargeability.

Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982). It is to be applied where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum designed for suitors seeking justice," Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953), to prevent litigants from "playing fast and loose with the courts." Id. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." Davis v.

Wakelee, 156 U.S. 680, 689, (1895). The doctrine of estoppel is intended to protect the courts rather than the litigants,[2] so it follows that a court, even an appellate court, may raise the estoppel on its own motion in an appropriate case. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1168 n.5 (4th Cir. 1982).

"The circumstances under which judicial estoppel may appropriately be invoked are probably not reducible o any formulation of principle," Allen 667 F.2d at 1166, but may be used where collateral estoppel and equitable estoppel fail to protect the interests the rule is intended to serve. Id. Although this court has never applied the doctrine, we have identified certain limitations on its application.

In Himel v. Continental Ill. Nat'l Bank, 596 F.2d 205, 210-11 (7th Cir. 1979), we held that the estoppel may be applied only where a clearly inconsistent position is taken. In that case we held that the plaintiff's position in a 1961 lawsuit asking that a trust instrument be modified to allow the trustee more flexibility in investing the trust corpus was not clearly inconsistent with its position in a 1972 lawsuit charging the trustee with mismanagement of the trust. Another limitation was identified in Eagle Foundation v. Dole, 813 F.2d 798, 810 (7th Cir. 1987), where we required that the party to be estopped have convinced the court to accept its position in the earlier litigation. A

party is not bound to a position it unsuccessfully maintained.

In the present case, both of these conditions are satisfied. Cassidy unequivocally urged the Cassidy I court to consider the defense of discharge. His present position is that it was error for the court to give him what he then wanted. Even though Cassidy did not prevail on the appeal as a whole, he did prevail on the subsidiary question of what issues were to be decided by the court. See Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 n.5 (5th Cir. 1982) (party need not finally prevail to be estopped from changing a successful position on a preliminary matter). Cassidy's maneuverings were clearly intended to delay the inevitable day of reckoning,

and in maneuvering he is trying to whipsaw this court. That is exactly the evil that the doctrine of judicial estoppel was meant to avoid.

It has been said that judicial estoppel applies only to positions on questions of fact. See e.g. United States . Siegel, 472 F. Supp. 440, 442 n.4 (N.D. Ill. 1979); Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 NW. U.L. Rev. 1244, 1262 (1986). We disagree. We note first that it may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts. See Allen, 667 F.2d at 1166 (doctrine probably not reducible to a formula). This is true for the same reasons that the courts are

cautious in attempting to exactly define fraud--the fear that unscrupulous persons may use strictures on use of the doctrine to subvert the purposes of the rule. We also observe a trend away from strict limitation of the doctrine to positions on matters of fact. In Pariot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987), the court noticed and continued a practice of holding parties to their representations that they would not pursue a legal claim. The court said, "On reflection, representations such as were made here, that a party will abandon a claim, present a stronger argument than do the classic cases for application of the doctrine." (emphasis on original). Similarly, in this case we think that

the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact. See also United States v. Starrett City Associates, 605 F. Supp. 262, 264 (E.D.N.Y. 1985) (doctrine applies to assertions of law or fact).

We emphasize that it is not the court that is bound by Cassidy's actions, but only Cassidy himself. Estoppel does not eliminate a claim or defense, but only prohibits a particular party from asserting it. Estoppel is an equitable concept, and its application is therefore within the court's sound discretion. See Motorola, Inc. v. CBS, Inc., 672 F. Supp. 1033 (N.D. Ill. 1986). It should not be used where it would work an injustice, such as where

the former position was the product of inadvertence or mistake, Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39, 48 (1857); Johnson Serv. Co. v. TransAmerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973) ("the rule looks toward cold manipulation and not an unthinking or confused blunder"); or where there is only an appearance of inconsistency between the two positions but both may be reconciled. Illinois Dept. of Trans. v. Coe, 112 Ill. App. 3d 506, 445 N.E.2d 506 (1983). In this case, we would work an injustice were we to fail to estop Cassidy. Cassidy has been delaying matters in the courts over his 1974 and 1975 tax liability since 1980. He has consistently acted to delay the proceedings and to obstruct the final resolution of his

liability. He has found it expedient to change a position which he successfully maintained in this court, but this court is under no obligation, either legal or moral, to allow itself to be used in this manner. The parties in Cassidy I fully briefed and argued the issue of dischargeability, and the court gave it full consideration. It would be unjust to require the Commissioner to relitigate a question that was originally raised by Cassidy himself, or to allow Cassidy a second full-scale adjudication of an issue that the court has already resolved against him.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Footnotes to Previous Document

[1]The case law on the question of whether a judgment based on an admission, as opposed to the admission itself, can be used in a later proceeding is relatively sparse. On consideration of the question, we hold that a judgment based solely on admissions made under Tax Court Rule 90 (or Fed. R. Civ. P. 36) cannot be used to estop relitigation of a factual question in a later proceeding.

None of the cases under Tax Court Rule 90(f) or Fed. R. Civ. P. 36(b) consider this issue directly. One could analogize deemed admissions to a default judgment on an issue of fact, but default judgments do not have collateral estoppel effect. Matter of Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983); 1B Moore's Federal Practice, Paragraph 0.444[2]; but see Matter of Wilson, 72 B.R. 956 (Bkr. M.D. Fla. 1987) (Default judgment in creditor's securities fraud suit collaterally estopped debtor from denying fraud in action to exempt debt from bankruptcy discharge).

One could consider a Rule 90 admission a special type of stipulation, but judgments based on stipulated facts have no collateral estoppel effect as to the matters stipulated, especially stipulations in tax cases. United States v. International Building Co., 345 U.S. 502, 506 (1953), Moore's Federal Practice Paragraph 0.444[4].

[1] continued

One might also analogize to a consent judgment on the factual issue. In Klingman v. Levinson, 831 F.2d 1292 (7th Cir. 1987), a consent judgment in a state court suit admitting fraud estopped the debtor from contesting the factual underpinnings of a later bankruptcy action to exempt the debt from discharge. The consent decree from the state case specifically recited that "in any subsequent proceeding all of the allegations of the Complaint and findings of this Court may be taken as true and correct without further proof." This court held that the "actually litigated" requirement for collateral estoppel would not bar use of the consent decree where the parties obviously contemplated such use. In the present case, it is arguable that Cassidy had to know that a decision on dischargeability would be made sooner or later. He also knew that the matters deemed admitted in the Tax Court were exactly what the bankruptcy court would have to find to hold the debt nondischargeable. But Tax Court Rule 90(f) by its terms precludes a determination that Cassidy should have expected the admission to be usable in any other forum. Absent such an expectation, the "actually litigated" requirement for application of the doctrine of collateral estoppel cannot be satisfied.

In view of the policy behind the rule authorizing admissions, which is to encourage admissions so as to narrow the scope of the issues for trial and simplify proof on the

remaining issues, Advisory Committee Notes to 1970 Amendment of Fed. R. Civ. P. 36, we believe that it would be harmful to give preclusive effect to a judgment based solely on an admission.

[2] For this reason prejudice to the opponent from the change of position is not a necessary element of judicial estoppel, thus contrasting judicial estoppel from the more familiar equitable estoppel. Konstantinidis v. Chen, F.2d 933 (D.C. Cir. 1980).

United States District Court

Center District of Illinois

THOMAS V. CASSIDY,

Debtor, Plaintiff-Appellant,

V.

COMMISSIONER OF INTERNAL REVENUE,

Defendant-Appellee.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88-1108

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the ruling of the Bankruptcy Court appealed

from is hereby Affirmed, pursuant to Order entered this date.

December 20, 1988 — John M. Waters

DATE — Clerk

_____

(By) Deputy Clerk

Leonard D. Brown

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

In re)

THOMAS V. CASSIDY,)

Plaintiff-Appellant, Case No. 88-1108

v.)

COMMISSIONER OF)

INTERNAL REVENUE,)

Defendant-Appellee.)

ORDER

The issue for resolution on this bankruptcy appeal is whether or not a judgment in prior tax court assessment proceedings requires the application of the doctrine of res judicata in bankruptcy discharge proceedings. The bankruptcy court found that the answer to that question is "yes," and applied the ruling of the tax court in finding that Appellant's tax liabilities and

penalties were non-dischargeable. Appellant now appeals that ruling pursuant to Rule 8001(a) of the Bankruptcy Rules. While this Court does not believe that res judicata is the relevant preclusion doctrine in this case, this Court finds that collateral estoppel is relevant. In applying the latter doctrine to the facts of this case, this Court believes that the decision of the bankruptcy court must be AFFIRMED.

FACTS

On June 24, 1980, Defendant-Appellee, Commissioner of Internal Revenue (hereinafter referred to as "Appellee"), sent Plaintiff-Appellant, Thomas V. Cassidy (hereinafter referred to as "Appellant"), a notice of deficiency in federal income taxes for

the fiscal years ending August 31, 1974 and August 31, 1975. The tax deficiencies were in the amounts of $12,865 and $22,028, respectively. The Commissioner also claimed that all or part of the underpayment was due to fraud and, pursuant to Section 6653(b) of the Internal Revenue Code, assessed civil fraud penalties of $11,774 for 1974 and $11,014 for 1975. Appellant then filed a petition with the United States Tax Court for a redetermination of his income tax liability.

Before the tax court proceedings came to trial, a petition for bankruptcy under Chapter 7, 11 U.S.C. Section 701 et seq., was filed against Appellant on February 14, 1983. A Discharge of Debtor order was entered by the United States Bankruptcy Court for the Central

District of Illinois on March 13, 1984. One month after discharge, the bankruptcy court entered an order lifting the automatic stay previously in effect so that the tax court proceedings could continue.

In the tax court proceedings, Appellant mailed Appellee a Request for Admissions of Fact on June 12, 1984. Appellant did not respond within the requisite time period, so Appellee moved for summary judgment based upon the matters deemed to be admitted. The tax court found that the deemed admissions of fact in Appellee's request to admit supported the deficiencies determined by the Appellee, and granted the Motion for Summary Judgment.

Appellant appealed the tax court's ruling to the United States Court of Appeals for the Seventh Circuit. Appellant contested the tax court's finding of an income tax deficiency and its imposition of fraud penalties. The Court of Appeals affirmed the tax court decision. Cassidy v. Commissioner of Internal Revenue, 814 F.2d 477 (7th Cir. 1987).

Appellant filed a Complaint to Determine Dischargeability of Debt in the United States Bankruptcy Court for the Central District of Illinois on November 17, 1987. Appellee, invoking the doctrine of res judicata, filed a Motion to Dismiss the Complaint on the basis that the issue of dischargeability had already been determined in the tax court proceedings

and subsequent review by the Seventh Circuit Court of Appeals. On February 2, 1988, the bankruptcy court entered an order allowing the Motion to Dismiss. This appeal followed.

Res Judicata

In his appeal, Appellant argues that the order of the tax court has no preclusive effect in the bankruptcy court discharge proceeding. Appellant notes that, in order for the doctrine of res judicata to apply, there must be:

1. Identity of the thing being sued upon;
2. Identity of the cause of action;
3. Identity of persons and parties; and
4. Identity of the ability of a party to sue or be sued.

In re Goodman, 25 Bankr. 932, 938 (Bankr. N.D. Ill. 1982). According to Appellant, there is no identity of the cause of action in the bankruptcy proceedings and the tax court proceedings. Appellant claims that the tax court merely assessed the deficiencies, or established the liability, against Appellant, while the bankruptcy proceeding was an action to determine whether the deficiencies or liability assessed was dischargeable.

Appellant also claims that, because it was Congress' intent to have the bankruptcy court adjudicate the dischargeability of a debt, res judicata has no application to a proceeding such as this, notwithstanding the nature of the tax court proceeding. In support of this

argument, Appellant cites the case of In re Goodman, 25 Bankr. 932 (Bankr. N.D. Ill. 1982). Goodman, in turn relied upon the United States Supreme Court case of Brown v. Felson, 442 U.S. 127 (1979). The Goodman court noted that, in Brown, the Supreme Court

> held that res judicata did not apply [in discharge proceedings] and that "the bankruptcy court is not confined to a review of the judgment and record in the prior state court proceeding when considering the dischargeability of respondent's debt." Id. at 139-39, 99 S.Ct. at 2212-13. The court reasoned that Congress intended for the bankruptcy court to resolve dischargeability issues and that by limiting the application of res judicata , the

> bankruptcy court would be able to weigh all the evidence and accurately determine whether the debtor did in fact commit deceit, fraud, or malicious conversion. Id. at 138, 99 S.Ct. at 2212.

Goodman, 25 Bankr. at 938-39.

As noted by the Goodman court, while Brown involved Section 17 of the prior Bankruptcy Act, Brown's rationale has been applied to dischargeability proceedings under Section 523 of the Bankruptcy Code. Id., citing, In re Dohm, 19 Bankr. 132 (Bankr. N.D. Ill. 1981); In re Spector, 22 Bankr. 226 (Bankr. N.D. N.Y. 1982); In re Supple, 14 Bankr. 898 (Bankr. D. Conn. 1981). On the authority of Goodman and Brown, Appellant charges that the bankruptcy court's dismissal of his complaint to

determine dischargeability of a debt by application of the res judicata principle was error.

The Court believes that Appellant's arguments miss the mark, and finds that the decision of the bankruptcy court must be affirmed. Even though the bankruptcy court did not base its ruling on the principle of collateral estoppel, affirmance is in order based upon application of collateral estoppel principles to the facts of this case.

While Appellant summarily dismisses the application of res judicata principles to bankruptcy dischargeability proceedings on the authority of Brown and Goodman, a closer reading of those cases shows that Brown and Goodman are distinguishable from this case. The

Brown Court found that questions of deceit, fraud, and malicious conduct are the types of questions that Congress intended that a bankruptcy court would resolve, Brown, 442 U.S. at 138, thus indicating that res judicata should not be applied here. But the Brown Court's explanation of its ruling indicates that its refusal to apply res judicata in that case does not preclude the application of the doctrine in the case at bar.

In Brown, unlike the case at hand, questions of deceit, fraud, and malicious conversion were squarely in issue for the first time in the bankruptcy court. Id. That fact was important in the Brown Court. In addition, the Brown Court emphasized that the party who sought to prevent

the application of the res judicata doctrine was attempting to meet the new defense of bankruptcy which the debtor had interposed between the Brown petitioner and the sum that was determined to be due to him. Id. at 133.

Here, the question of fraud is not being raised for the first time in the bankruptcy court. Rather, the issue of fraud has been conclusively determined by the tax court. Therefore, the need that the Brown Court saw for the bankruptcy court to weigh all of the evidence on the question of fraud is absent. Also, unlike Brown, the issue of bankruptcy was extant at the time that the tax court rendered its decision finding Appellant's conduct to be fraudulent.

Although Appellant's bankruptcy was "interposed" between the initiation of the tax court proceedings and the final judgment by the tax court, it was not "interposed" in the sense that that word was used by the Brown Court. Here, Appellant claimed in the tax court that his liability had been discharged in bankruptcy, but the tax court rejected that argument. 59 T.C.M. 784, 787 (CCH) (T.C. 1985). The tax court noted, in footnote 3 of its opinion:

> On November 13, 1984, petitioner filed petitioner's motion to dismiss with prejudice and motion for summary judgment. Petitioner's motion was based on his contention that his tax liability was discharged in bankruptcy. We summarily deny

petitioner's motion because petitioner's contention is on its face inconsistent with the explanatory memorandum attached to petitioner's Discharge of Debtor order in the April 13, 1984, order issued by the same bankruptcy judge lifting the automatic stay to permit this case to go forward in the Tax Court. Moreover, the redetermination of an income tax deficiency has "nothing to do with collection of the tax nor any similarity to an action for collection of a debt. * * *." Swanson v. Commissioner, [Dec. 33,742]. 65 T.C. 1180, 1184 (1976). Accordingly, if there is an question as to the collectability of any income tax deficiencies, which we doubt, that question is beyond the

jurisdiction of this Court. Graham v. Commissioner, [Dec. 37,460], 75 T.C. 389, 399 (1980).

Id. at 786 n.3. It is clear from this passage that the question of dischargeability was, in fact, "raised" in the tax court by Appellant himself. The tax court, however, properly recognized that the question of dischargeability was beyond its jurisdiction, and focused its inquiry on the question of fraud.

Evidently, Appellant wasn't satisfied with the tax court's ruling on the dischargeability issue, so he raised it again before the Court of Appeals. The Court of Appeals also rejected Appellant's argument. In doing so, the Court of Appeals stated:

The taxpayer correctly recognizes that a discharge granted under Section 727 of the Bankruptcy Code generally "discharges the debtor from all debts that arose before the date of the order for relief." 11 U.S.C. Section 727(b). However Section 523 of the same Code contains numerous exceptions to this general rule. Subsection 523(a)(1)(C) excepts tax payments "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." Because the taxpayer's deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders then non-dischargeable. As the legislative history of this section makes clear, the "date of the taxable year with

regard to which the fraud occurred is immaterial." S.Rep. No. 989, 95th Cong., 2d Sess. 78, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5864. Moreover, subsection 523(a)(7)(A) mandates that fraud penalties are non-dischargeable if the underlying tax with respect to which the penalty was imposed is also non-dischargeable. S.Rep. No. 989, at 79, U.S. Code Cong. & Admin. News 1976, p. 5864. Because the taxpayer's deficiencies are non-dischargeable, his tax penalties are similarly non-dischargeable. Thus we find the taxpayer's contention that his deficiencies and penalties were discharged to be without merit.

Cassidy v. Commissioner of Internal Revenue, 814 F.2d 477, 481 (7th Cir. 1987).

Goodman is likewise distinguishable. There, the bankruptcy court found that a California default judgment should not be given preclusive effect in a bankruptcy dischargeability proceeding. Goodman, 25 Bankr. at 939. Because the Goodman judgment was obtained by default, there was never an actual determination by a court of proper jurisdiction that the debtor was guilty of fraud. Here, in contrast, it was Appellant's own failure to respond to Appellee's request for admission of fact which led to the tax court's finding of fraud pursuant to Rule 90(c) of the Tax Court Rules of Practice and Procedure.

This Court finds, however, that the bankruptcy court confused the doctrines of res judicata and collateral estoppel. The first two requirements for applicability of res judicata, that is, identity of the thing being sued upon and identity of the cause of action, are absent. Yet, as described below, all of the elements of collateral estoppel are present.

Collateral Estoppel

The elements of collateral estoppel are:

1. The issue sought to be precluded must be the same issue as that involved in the prior action;

2. There is a final judgment on the merits;

3. The party against whom the doctrine is asserted was a party or in privity with a party to the prior suit;

4. The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior action; and

5. The determination must have been essential to the final judgment. Drum v. Nasuti, 648 F.Supp. 888, 898 (E.D. Pa. 1986).

Appellant also contends that none of the elements of collateral estoppel existed in this case, so that that doctrine does not bar its proceeding in the bankruptcy court, either. Specifically, Appellant claims that the issue sought to be precluded in the bankruptcy court dischargeability proceeding were not the same issues as

were involved in the tax court proceedings. Appellant argues that, although the tax court already adjudicated the issue of fraud, it did not adjudicate the amount of the deficiencies related to the fraud. It is Appellant's position that, if only a portion of the tax deficiencies, he claims, would be discharged.

Appellant also claims that the issue of fraud was never actually litigated in the tax court proceeding. He makes this claim because the issue of fraud was, in essence, determined by default in the tax court, because he did not respond to Appellee's Motion for Summary Judgment in that court. Therefore, the second element of the collateral estoppel test is not satisfied.

Appellant next argues that, assuming that the first and second elements of collateral estoppel are satisfied, any issues relating to fraud decided by the tax court is not the type of valid judgment to be recognized by the bankruptcy court in a discharge proceeding. Appellant so claims because, in order to be a valid judgment for purposes of applying res judicata or collateral estoppel, the prior adjudication must be from a court of competent jurisdiction. See, Local 1006 v. Wurf, 558 F.Supp. 230 (N.D. Ill. 1982), aff'd, 746 F.2d 1483 (7th Cir. 1984). Because the tax court did not have subject matter jurisdiction to determine issues of dischargeability, Appellant claims that any such

determination by the tax court is invalid.

Finally, Appellant claims that the Court of Appeals' discussion relating to discharge was not essential to its decision. Appellant argues that the tax court's determination simply establishes a liability notwithstanding any issues relating to discharge in bankruptcy. Therefore, to the extent that the court of appeals referred to the issue of dischargeability in its opinion, that discussion is merely dictum. Consequently, although the discussion of the Court of Appeals concerning dischargeability commands respect, it is not, Appellant argues, an issue that was essential to the Court of Appeals' decision. Absent that element, Appellant claims that it

is not a "prior adjudication" sufficient to invoke the doctrine of collateral estoppel in the bankruptcy court's discharge proceeding.

It is interesting that Appellant now claims that the tax court and the Court of Appeals had no jurisdiction to consider the dischargeability question when it was Appellant himself who raised those questions before the respective courts. As stated earlier, the tax court refused to be so baited by Appellant, and did not pass upon the actual dischargeability question. The Court of Appeals, however, specifically found that Appellant's debts were non-dischargeable. In doing so, the Court of Appeals relied upon the tax court's finding that Appellant made a fraudulent return with respect to those

taxes. The Appellant Court did not rely upon any "determination" by the tax court that the debt was non-dischargeable, for, as stated above, the tax court made no such finding. Rather, the tax court merely made a ruling which was clearly within its jurisdiction: that Appellant made fraudulent returns and willfully attempted to evade or defeat income taxes. Moreover, in contrast to Appellant's contentions, the tax court entered judgment against Appellant for a specific amount. The final sentence of the tax court order states as follows;

> Accordingly, respondent's motion for summary judgment is granted as to the deficiencies and additions to tax for fraud <u>in the amounts stated</u>.

51 T.C.M. at 792 (CCH) (emphasis added). Thus, Appellant's argument that the bankruptcy court still must determine which amounts of his tax liability are based upon fraud is without merit.

Although Appellant claims that the decision in the prior tax court proceeding was obtained by default and, given the nature of a judgment by default, the issue relating to fraud and dischargeability were "actually litigated,' this Court disagrees. The issue of fraud was raised and Appellee presented arguments on it. Appellant had a full and fair opportunity to respond, but did not do so. The only sense in which the fraud question was not "litigated" in the tax court is in the sense that Appellant failed to

present his position on the summary judgment issue to the tax court. Were the Court to permit Appellant to attack the question of fraud in the bankruptcy court, the Court would be allowing a party who has failed to respond as required by the Tax Court rules to ignore the judgment entered against him. This Court does not believe that such was the intent of the courts in Brown or Goodman.

Appellant's main problem seems to be his focus upon the question of dischargeability, rather than the question of fraud. There is no question that the tax court determined that Appellant was guilty of fraud, and found that his tax liability and penalties were in the amounts specified. Given that determination,

non-dischargeability automatically follows pursuant to Section 523(a)(2)(A) of the Bankruptcy Code.

Here, the real issue sought to be precluded is the question of whether or not Appellant's tax return was fraudulent, and not whether or not his tax debt is dischargeable. Using that focus, it is clear that the question of fraud was the same as that involved in the tax court proceeding, there was a final judgment on the merits, Appellant is the same party as was involved in the tax court suit, Appellant had a full and fair opportunity to litigate the fraud issue (although he did not take advantage of that opportunity), and the determination of fraud was essential to that judgment. Consequently, all of the elements of

collateral estoppel are satisfied. Because Appellant is collaterally estopped from relitigating the fraud issue, Section 523(a)(2)(A) of the Bankruptcy Code precludes a redetermination by the bankruptcy court as to whether or not Appellant's return was fraudulent. It follows, then, that because the bankruptcy court is bound by the determination of fraud, the bankruptcy court must, pursuant to Section 523(a)(2)(A), find that those debts are non-dischargeable. For this reason, although this Court believes that the bankruptcy court applied the wrong title to the preclusion doctrine that it was applying, the result reached by the bankruptcy court is AFFIRMED.

It is so ordered this 20th day of December, 1988.

Michael M. Mihm
United States District
Judge

UNITED STATES TAX COURT

WASHINGTON, D.C. 2021

THOMAS V. CASSIDY)

Petitioner,)

v.) Docket No. 18125-80

COMMISSIONER OF)

INTERNAL REVENUE,)

Respondent.)

ORDER AND DECISION

On August 22, 1984, respondent filed a motion for summary judgment. On November 13, 1984, petitioner filed a motion to enlarge time for response to request for admissions and reply to interrogatories and alternative motion to withdraw or modify deemed admissions. Pursuant to the determination of this Court, as set

forth in its Opinion filed and served April 3, 1986, it is

ORDERED that respondent's motion for summary judgment is granted. It is further

ORDERED that petitioner's above-referenced motion to enlarge time for response to request for admissions and reply to interrogatories and alternative motion to withdraw or modify deemed admissions is denied. It is further

ORDERED and DECIDED that there are deficiencies in income taxes due from petitioner for the taxable years ended August 31, 1974, and August 31, 1975, in the amounts of $12,865 and $22,028 respectively; and

That there are additions to tax due from petitioner for the taxable years

ended August 31, 1974, and August 31, 1975, under the provisions of I.R.C. Sec. 6653(b) in the amounts of $11,774 and $11,014, respectively.

Arthur L. Nims, III

Judge

Entered: Apr 4, 1986

In the

United States Court of Appeals

For the Seventh Court

No. 86-2302

THOMAS V. CASSIDY,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the United States Tax Court.

No. 18125-80-Arthur L. Nims, III, Judge.

Before Cudahy, and Ripple, Circuit Judges, and Will, Senior District Judge.

Ripple, Circuit Judge. In this case, appellant-taxpayer Thomas V. Cassidy appeals from the order and decision of the United States Tax Court granting

summary judgment for the Commissioner with respect to income tax deficiencies and fraud penalties. For the reasons set forth in this opinion, we affirm the judgment of the tax court.

I

Facts

On June 24, 1980, the Commissioner of Internal Revenue sent the appellant a notice of deficiency in federal income taxes for the fiscal years ending August 31, 1974 and August 31, 1975. These deficiencies were in the amounts of $12,865 and $22,028 respectively. They resulted from an adjustment by the Commissioner of the taxpayer's income tax returns by including within his taxable income previously unreported legal fees and by disallowing various deductions. The Commissioner also

found that all or part of the underpayment of tax was due to fraud. Therefore, pursuant to section 6653(b) of the Internal Revenue Code, the Commissioner assessed against the taxpayer civil fraud penalties of $11,774 for 1974 and $11,014 for 1975. R.2 at 5-6.

On September 25, 1980, the taxpayer filed a petition with the United States Tax Court for redetermination of his income tax liability. A trial date was set for March 22, 1982. Upon call of the case for trial, his counsel moved for permission to withdraw and for a continuance. While granting these motions, the court admonished that there would be no additional continuances. In preparation for trial, the Commissioner, on April 27,

1982, sent the taxpayer an informal discovery request asking that he stipulate to all undisputed material facts in accordance with Tax Court Rule of Practice and Procedure 91(a) and submit documents in support of his position. The taxpayer failed to provide any of the requested information. Consequently, the Commissioner initiated formal discovery proceedings against the taxpayer and, on December 7, 1982, served the taxpayer with a request for the production of documents together with interrogatories. The Commissioner's subpoena duces tecum was similarly ignored.

On November 14, 1983, the court issued a notice setting the case for trial on January 30, 1984. On January

3, 1984, the taxpayer notified the tax court that he was the subject of an involuntary petition for bankruptcy under chapter 7. 11 U.S.C. Sections 71 et seq. This involuntary petition had been filed on February 14, 1983--almost, a year before the taxpayer notified the tax court of its pendency. Because of the pendency of the bankruptcy action, the tax court automatically stayed its proceedings. On March 13, 1984, the taxpayer received a discharge from the bankruptcy court releasing him from all dischargeable debts. One month later, on the petition of the government, the bankruptcy court lifted its automatic stay "in order to permit the Tax Court proceeding between the parties now pending to proceed forward." R.17, Ex.

A. The tax court then set the case for trial at the first regularly scheduled Chicago, Illinois trail session during the 1984 fall term. In preparation for that litigation, the Commissioner, on June 12, 1984, mailed to the taxpayer a request for admissions together with other discovery documents. On June 15, 1984, a copy of this request was filed with the court. The taxpayer did not respond; therefore, on August 22, 1984, the Commissioner moved for summary judgment based upon the matters deemed to be admitted.

On September 27, 1984, five days before the commencement of trial, the taxpayer's attorney filed an entry of appearance and a motion for a general continuance of the trial. After a hearing, the tax court denied the

continuance and held that the matters set forth in the request for admissions were deemed to be admitted.

On September 27, 1984, five days before the commencement of trial, the taxpayer's attorney filed an entry of appearance and a motion for a general continuance of the trial. After a hearing, the tax court denied the continuance and held that the matters set forth in the request for admissions were deemed admitted. The tax court afforded the taxpayer thirty days to provide a written response to the Commissioner's motion for summary judgment. On November 13, 1984, forty-five days later, the taxpayer filed a reply. He claimed that he had not received the request for admissions until September 4, 1984 and further

argued that collection for the deficiencies was barred by the statute of limitations. The taxpayer also filed a motion to dismiss and a motion for summary judgment in which he asserted that the deficiencies at issue had been discharged in the bankruptcy proceeding. The taxpayer appended to his motions an affidavit of Susan J. Fasse, a paralegal administrator, averring that the taxpayer had not received the request for admissions until September 4, 1984.

The tax court set the matter for a hearing on February 26, 1985. At the hearing, the taxpayer testified on his own behalf and also presented the testimony of Ms. Fasse. Several exhibits also were admitted. One of the exhibits was a small envelope

postmarked "Springfield, Illinois, August 31, 1984." Petitioner's Ex. 4. The taxpayer alleged that he received the request for admissions in this envelope. The Commissioner attempted to show that the request for admissions could not have been sent in this small envelope. The Commissioner presented the testimony of an employee of the Internal Revenue Service who testified that the request for admissions was mailed in a large envelope that had also contained two other documents, a second request for production of documents and interrogatories. It was standard practice, the employee testified for these multi-paged documents to be sent to taxpayers in large envelopes. The IRS employee also testified that the only mail the

taxpayer had been sent on August 31, 1984 was a one-page letter in a small envelope.

II

The Tax Court's Decision

The tax court found that the Commissioner had properly mailed and served the request of admissions to the taxpayer on June 12, 1984. The court explained that its decision was based on its observation of the witnesses' demeanor and the consistency of their testimony as well as on the physical evidence that had been submitted. The court noted that the request for admissions could not have fit within the small envelope as maintained by the taxpayer. The court concluded that "[t]he more plausible explanation is that petitioner and Fasse fabricated

their testimony in an effort to avoid the consequences of petitioner's continued deliberate disregard for his responsibilities in connection with this case." Cassidy v. Commissioner, No. 18125-80, slip op. at 18 (T.C. Apr. 3, 1986); R.49 at 18. Accordingly, the tax court denied the taxpayer's motion for extension of time to answer the request for admissions and granted the Commissioner's motion for summary judgment. As noted by the court, Rule 90 of the Tax Court Rules of Practice and Procedure requires a party to respond to requests for admissions within thirty days after service. If a party fails to reply within thirty days, the matters contained in the request are deemed conclusively established.[1]

The court found that the deemed admissions fully supported the deficiencies that had been determined by the Commissioner. Additionally, the tax court found that the admitted facts were sufficient to meet the Commissioner's burden of proof with respect to the fraud penalties. In the tax court's view, the admissions were replete with the requisite indicia of fraud. The matters deemed admitted were: 1) that the taxpayer had purposely circumvented procedures devised by his accountants so that he might omit reporting income, 2) that he claimed non-existent deductions, and 3) that he claimed business deductions for expenses that were expenditures for his personal benefit.

III

Analysis

A. Dischargeability of the Deficiencies and Penalties

The taxpayer first argues that his tax liabilities and fraud penalties were discharged in the chapter 7 bankruptcy proceeding. He submits that the deficiencies and fraud penalties were incurred more than three years prior to his filing for bankruptcy and therefore were discharged pursuant to 11 U.S.C. Section 523(a)(7)(B). This subsection allows tax penalties "imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition" to be discharged. 11 U.S.C. Section 523(a)(7)(B).

The taxpayer correctly recognizes that a discharge granted under section 727 of the Bankruptcy Code generally "discharges the debtor from all debts that arose before the date of the order for relief." 11 U.S.C. Section 727(b). However, section 523 of the same code contains numerous exceptions to this general rule. Subsection 523(a)(1)(C) excepts tax payments "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." Because the taxpayer's deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders them nondischargeable. As the legislative history of this section makes clear, the "date of the taxable year with regard to which the fraud occurred is

immaterial." S. Rep. No. 989, 95th Cong., 2d Sess. 78, reprinted in 1978 U.S. Code Cong. & Admin. News 5787,5864. Moreover, subsection 523(a)(7)(A)[2] mandates that fraud penalties are nondischargeable if the underlying tax with respect to which the penalty was imposed is also nondischargeable. S.Rep. No. 989 at 79. Because the taxpayer's deficiencies are nondischargeable, his tax penalties are similarly nondischargeable. Thus, we find the taxpayer's contention that his deficiencies and penalties were discharged to be without merit.

B. Review of the Tax Court's Factual Findings

The taxpayer,also asserts that the tax court erred in finding that he had

received the Commissioner's request for admissions on June 12, 1984. We may, however, only overturn the tax court's finding if it is clearly erroneous. As stated by the Supreme Court, "[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) see also Wainwright Bank & Trust Co. v.Railroadmen's Fed. Sav. & Loan Ass'n, 806 F.2d 146, 150 n.6 (7th Cir. 1986); Fed. R. Civ. P. 52(a).

The record in this case amply supports the tax court's finding. As

the court noted, the Commissioner's office records showed that fifty pages of documents were sent to the taxpayer in a 9 1/2 by 12 1/4 inch envelope on June 12, 1984. At the hearing, the taxpayer introduced a 4 1/4 by 9 1/2 inch envelope that was far too small to have contained the documents that the taxpayer claimed to have received on September 4. Moreover, the envelope submitted by the taxpayer did not appear to have been stuffed with documents. Further, the set of documents presented by the taxpayer contained only eighteen pages. It was missing two exhibits that were thirty-two pages in length. The court noted that there were several sets of holes in the documents. Ms. Fasse explained the presence of the holes by saying

that she had removed staples from the documents in order to photocopy them. The court, however, concluded that one of the holes was made by a large staple of the type that would have been used to secure fifty pages. Under these circumstances, we do not find the tax court's conclusion that the taxpayer received the Commissioner's request for admissions on June 12 to be clearly erroneous. In fact, we can hardly fault the court for concluding that "the more plausible explanation" for the discrepancies in the taxpayer's testimony "is that the [taxpayer] and Fasse fabricated their testimony in an effort to avoid the consequences of [the taxpayer's] continued deliberate disregard for his responsibilities in connection with his case . . ."

Cassidy v. Commissioner, No. 18125-80, slip op. at 18 (T.C. Apr. 3, 1986); R.49 at 18. Furthermore, because the taxpayer's conduct demonstrated a deliberate attempt to delay the presentation of his case, the tax court hardly acted beyond the bounds of its discretion in refusing to permit the taxpayer to withdraw his admissions.

C. Using the Deemed Admissions to Establish Fraudulent Intent

The taxpayer argues that the admitted facts were insufficient to establish that the deficiencies for the years involved resulted from fraud. However, as the tax court indicated, the admissions of the taxpayer contained numerous indicia of fraud. He admitted, for example, that the amounts claimed as deductions were not expended

for the purposes designated on his returns. He also admitted that he used funds claimed as business deductions for his personal benefit and that he withdrew funds from his professional accounts, although he knew that, under his bookkeeping system, the amounts would not be included in his income. He was also aware that he was receiving funds for his legal services but not reporting the full amount on his returns. R.22, app. at 1-2. These facts deemed admitted clearly establish that a substantial part of the underpayment of the tax was in fact due to fraud.[3]

The judgment of the United States Tax Court was in conformity with the applicable sections of the Internal Revenue Code and the Bankruptcy Code.

The facts were determined by a fair procedure and amply support the judgment of the court. Accordingly, the judgment of the United States Tax Court is affirmed.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES TAX COURT

WASHINGTON, D.C. 2021

THOMAS V. CASSIDY)

Petitioner,)

v.) Docket No. 18125-80

COMMISSIONER OF)

INTERNAL REVENUE,)

Respondent.)

ORDER AND DECISION

On August 22, 1984, respondent filed a motion for summary judgment. On November 13, 1984, petitioner filed a motion to enlarge time for response to request for admissions and reply to interrogatories and alternative motion to withdraw or modify deemed admissions. Pursuant to the determination of this Court, as set

forth in its Opinion filed and served April 3, 1986, it is

ORDERED that respondent's motion for summary judgment is granted. It is further

ORDERED that petitioner's above-referenced motion to enlarge time for response to request for admissions and reply to interrogatories and alternative motion to withdraw or modify deemed admissions is denied. It is further

ORDERED and DECIDED that there are deficiencies in income taxes due from petitioner for the taxable years ended August 31, 1974, and August 31, 1975, in the amounts of $12,865 and $22,028 respectively; and

That there are additions to tax due from petitioner for the taxable years

ended August 31, 1974, and August 31, 1975, under the provisions of I.R.C. Sec. 6653(b) in the amounts of $11,774 and $11,014, respectively.

Arthur L. Nims, III

Judge

Entered: Apr 4, 1986

In the

United States Court of Appeals

For the Seventh Court

No. 86-2302

THOMAS V. CASSIDY,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the United States Tax Court.

No. 18125-80-Arthur L. Nims, III, Judge.

Before Cudahy, and Ripple, Circuit Judges, and Will, Senior District Judge.

Ripple, Circuit Judge. In this case, appellant-taxpayer Thomas V. Cassidy appeals from the order and decision of the United States Tax Court granting

summary judgment for the Commissioner with respect to income tax deficiencies and fraud penalties. For the reasons set forth in this opinion, we affirm the judgment of the tax court.

I

Facts

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found that all or part of the underpayment of tax was due to fraud. Therefore, pursuant to section 6653(b) of the Internal Revenue Code, the Commissioner assessed against the taxpayer civil fraud penalties of $11,774 for 1974 and $11,014 for 1975. R.2 at 5-6.

On September 25, 1980, the taxpayer filed a petition with the United States Tax Court for redetermination of his income tax liability. A trial date was set for March 22, 1982. Upon call of the case for trial, his counsel moved for permission to withdraw and for a continuance. While granting these motions, the court admonished that there would be no additional continuances. In preparation for trial, the Commissioner, on April 27,

1982, sent the taxpayer an informal discovery request asking that he stipulate to all undisputed material facts in accordance with Tax Court Rule of Practice and Procedure 91(a) and submit documents in support of his position. The taxpayer failed to provide any of the requested information. Consequently, the Commissioner initiated formal discovery proceedings against the taxpayer and, on December 7, 1982, served the taxpayer with a request for the production of documents together with interrogatories. The Commissioner's subpoena duces tecum was similarly ignored.

On November 14, 1983, the court issued a notice setting the case for trial on January 30, 1984. On January

3, 1984, the taxpayer notified the tax court that he was the subject of an involuntary petition for bankruptcy under chapter 7. 11 U.S.C. Sections 71 et seq. This involuntary petition had been filed on February 14, 1983--almost, a year before the taxpayer notified the tax court of its pendency. Because of the pendency of the bankruptcy action, the tax court automatically stayed its proceedings. On March 13, 1984, the taxpayer received a discharge from the bankruptcy court releasing him from all dischargeable debts. One month later, on the petition of the government, the bankruptcy court lifted its automatic stay "in order to permit the Tax Court proceeding between the parties now pending to proceed forward." R.17, Ex.

A. The tax court then set the case for trial at the first regularly scheduled Chicago, Illinois trail session during the 1984 fall term. In preparation for that litigation, the Commissioner, on June 12, 1984, mailed to the taxpayer a request for admissions together with other discovery documents. On June 15, 1984, a copy of this request was filed with the court. The taxpayer did not respond; therefore, on August 22, 1984, the Commissioner moved for summary judgment based upon the matters deemed to be admitted.

On September 27, 1984, five days before the commencement of trial, the taxpayer's attorney filed an entry of appearance and a motion for a general continuance of the trial. After a hearing, the tax court denied the

continuance and held that the matters set forth in the request for admissions were deemed to be admitted.

On September 27, 1984, five days before the commencement of trial, the taxpayer's attorney filed an entry of appearance and a motion for a general continuance of the trial. After a hearing, the tax court denied the continuance and held that the matters set forth in the request for admissions were deemed admitted. The tax court afforded the taxpayer thirty days to provide a written response to the Commissioner's motion for summary judgment. On November 13, 1984, forty-five days later, the taxpayer filed a reply. He claimed that he had not received the request for admissions until September 4, 1984 and further

argued that collection for the deficiencies was barred by the statute of limitations. The taxpayer also filed a motion to dismiss and a motion for summary judgment in which he asserted that the deficiencies at issue had been discharged in the bankruptcy proceeding. The taxpayer appended to his motions an affidavit of Susan J. Fasse, a paralegal administrator, averring that the taxpayer had not received the request for admissions until September 4, 1984.

The tax court set the matter for a hearing on February 26, 1985. At the hearing, the taxpayer testified on his own behalf and also presented the testimony of Ms. Fasse. Several exhibits also were admitted. One of the exhibits was a small envelope

postmarked "Springfield, Illinois, August 31, 1984." Petitioner's Ex. 4. The taxpayer alleged that he received the request for admissions in this envelope. The Commissioner attempted to show that the request for admissions could not have been sent in this small envelope. The Commissioner presented the testimony of an employee of the Internal Revenue Service who testified that the request for admissions was mailed in a large envelope that had also contained two other documents, a second request for production of documents and interrogatories. It was standard practice, the employee testified for these multi-paged documents to be sent to taxpayers in large envelopes. The IRS employee also testified that the only mail the

taxpayer had been sent on August 31, 1984 was a one-page letter in a small envelope.

II

The Tax Court's Decision

The tax court found that the Commissioner had properly mailed and served the request of admissions to the taxpayer on June 12, 1984. The court explained that its decision was based on its observation of the witnesses' demeanor and the consistency of their testimony as well as on the physical evidence that had been submitted. The court noted that the request for admissions could not have fit within the small envelope as maintained by the taxpayer. The court concluded that "[t]he more plausible explanation is that petitioner and Fasse fabricated

their testimony in an effort to avoid the consequences of petitioner's continued deliberate disregard for his responsibilities in connection with this case." Cassidy v. Commissioner, No. 18125-80, slip op. at 18 (T.C. Apr. 3, 1986); R.49 at 18. Accordingly, the tax court denied the taxpayer's motion for extension of time to answer the request for admissions and granted the Commissioner's motion for summary judgment. As noted by the court, Rule 90 of the Tax Court Rules of Practice and Procedure requires a party to respond to requests for admissions within thirty days after service. If a party fails to reply within thirty days, the matters contained in the request are deemed conclusively established.[1]

The court found that the deemed admissions fully supported the deficiencies that had been determined by the Commissioner. Additionally, the tax court found that the admitted facts were sufficient to meet the Commissioner's burden of proof with respect to the fraud penalties. In the tax court's view, the admissions were replete with the requisite indicia of fraud. The matters deemed admitted were: 1) that the taxpayer had purposely circumvented procedures devised by his accountants so that he might omit reporting income, 2) that he claimed non-existent deductions, and 3) that he claimed business deductions for expenses that were expenditures for his personal benefit.

III

Analysis

A. Dischargeability of the Deficiencies and Penalties

The taxpayer first argues that his tax liabilities and fraud penalties were discharged in the chapter 7 bankruptcy proceeding. He submits that the deficiencies and fraud penalties were incurred more than three years prior to his filing for bankruptcy and therefore were discharged pursuant to 11 U.S.C. Section 523(a)(7)(B). This subsection allows tax penalties "imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition" to be discharged. 11 U.S.C. Section 523(a)(7)(B).

The taxpayer correctly recognizes that a discharge granted under section 727 of the Bankruptcy Code generally "discharges the debtor from all debts that arose before the date of the order for relief." 11 U.S.C. Section 727(b). However, section 523 of the same code contains numerous exceptions to this general rule. Subsection 523(a)(1)(C) excepts tax payments "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." Because the taxpayer's deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders them nondischargeable. As the legislative history of this section makes clear, the "date of the taxable year with regard to which the fraud occurred is

immaterial." S. Rep. No. 989, 95th Cong., 2d Sess. 78, reprinted in 1978 U.S. Code Cong. & Admin. News 5787,5864. Moreover, subsection 523(a)(7)(A)[2] mandates that fraud penalties are nondischargeable if the underlying tax with respect to which the penalty was imposed is also nondischargeable. S.Rep. No. 989 at 79. Because the taxpayer's deficiencies are nondischargeable, his tax penalties are similarly nondischargeable. Thus, we find the taxpayer's contention that his deficiencies and penalties were discharged to be without merit.

B. Review of the Tax Court's Factual Findings

The taxpayer also asserts that the tax court erred in finding that he had

received the Commissioner's request for admissions on June 12, 1984. We may, however, only overturn the tax court's finding if it is clearly erroneous. As stated by the Supreme Court, "[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) see also Wainwright Bank & Trust Co. v. Railroadmen's Fed. Sav. & Loan Ass'n, 806 F.2d 146, 150 n.6 (7th Cir. 1986); Fed. R. Civ. P. 52(a).

The record in this case amply supports the tax court's finding. As

the court noted, the Commissioner's office records showed that fifty pages of documents were sent to the taxpayer in a 9 1/2 by 12 1/4 inch envelope on June 12, 1984. At the hearing, the taxpayer introduced a 4 1/4 by 9 1/2 inch envelope that was far too small to have contained the documents that the taxpayer claimed to have received on September 4. Moreover, the envelope submitted by the taxpayer did not appear to have been stuffed with documents. Further, the set of documents presented by the taxpayer contained only eighteen pages. It was missing two exhibits that were thirty-two pages in length. The court noted that there were several sets of holes in the documents. Ms. Fasse explained the presence of the holes by saying

that she had removed staples from the documents in order to photocopy them. The court, however, concluded that one of the holes was made by a large staple of the type that would have been used to secure fifty pages. Under these circumstances, we do not find the tax court's conclusion that the taxpayer received the Commissioner's request for admissions on June 12 to be clearly erroneous. In fact, we can hardly fault the court for concluding that "the more plausible explanation" for the discrepancies in the taxpayer's testimony "is that the [taxpayer] and Fasse fabricated their testimony in an effort to avoid the consequences of [the taxpayer's] continued deliberate disregard for his responsibilities in connection with his case . . ."

Cassidy v. Commissioner, No. 18125-80, slip op. at 18 (T.C. Apr. 3, 1986); R.49 at 18. Furthermore, because the taxpayer's conduct demonstrated a deliberate attempt to delay the presentation of his case, the tax court hardly acted beyond the bounds of its discretion in refusing to permit the taxpayer to withdraw his admissions.

C. Using the Deemed Admissions to Establish Fraudulent Intent

The taxpayer argues that the admitted facts were insufficient to establish that the deficiencies for the years involved resulted from fraud. However, as the tax court indicated, the admissions of the taxpayer contained numerous indicia of fraud. He admitted, for example, that the amounts claimed as deductions were not expended

for the purposes designated on his returns. He also admitted that he used funds claimed as business deductions for his personal benefit and that he withdrew funds from his professional accounts, although he knew that, under his bookkeeping system, the amounts would not be included in his income. He was also aware that he was receiving funds for his legal services but not reporting the full amount on his returns. R.22, app. at 1-2. These facts deemed admitted clearly establish that a substantial part of the underpayment of the tax was in fact due to fraud.[3]

The judgment of the United States Tax Court was in conformity with the applicable sections of the Internal Revenue Code and the Bankruptcy Code.

The facts were determined by a fair procedure and amply support the judgment of the court. Accordingly, the judgment of the United States Tax Court is affirmed.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

Footnotes to Previous Document

* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, sitting by designation.

[1] Rule 90(c) of the Tax Court Rules of Practice and Procedure provides in relevant part:

> Each matter is deemed admitted unless, within 30 days after service of the request or within such shorter or longer time as the Court may allow, the party to whom the request is directed serves upon the requesting party (i) a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or (ii) an objection, stating in detail the reasons therefor.
> . . .

Rule 90(e) describes the effect of making an admission:

> Any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or modification of the admission. Subject to any other orders made in the case by the Court, withdrawal or modification may be permitted when the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy the Court that the withdrawal or modification will prejudice him in prosecuting his case or defense on the merits. . .

[2] Subsection 523(a)(7)(A) provides:

> A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt-
>
> * * *
>
> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty-
>
> relating to a tax of a kind not specified in paragraph (1) of this subsection; . . .

[3] We also reject the taxpayer's argument that the facts deemed admitted may not be used to support a finding of fraudulent intent. Rule 90 of the Tax Court Rules of Practice and Procedure contains no such limitation.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 5, 1990

Before

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

In the matter of:

Thomas V. Cassidy,

Debtor-Appellant,

No. 89-1121

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.

No. 88 C 1108

Michael M. Mihm, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause on January 18, 1990, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1121

IN RE	)	
	)	
THOMAS V. CASSIDY,	)	Appeal
	)	from the
Debtor.	)	United
	)	States
	)	District
THOMAS V. CASSIDY,	)	Court,
	)	Central
Plaintiff-Appellant,	)	District
	)	of
vs.	)	Illinois
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Defendant-Appellee.	)	

APPELLANT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

Whether the prior tax court assessment proceeding invokes the doctrine of *res judicata* or collateral estoppel in a bankruptcy court discharge proceeding.

2.

Whether the debtor's assessed penalties imposed for the tax years three years prior to the filing of the petition in bankruptcy are dischargeable as a matter of law.

3.

Whether the Commissioner's filing of a claim and participation in the distribution of the bankrupt estate constitutes a consent to dischargeability of the tax assessments subsequent to discharge.

JURISDICTION

The District Court's jurisdiction was by virtue of an appeal from the final order entered by the United States Bankruptcy Court, Central District of Illinois on February 2, 1988, and vested under 28 U.S.C. Section 158(a) and Bankruptcy Rule 8001(a). This is an appeal from the final judgment of the United States District Court, Central District of Illinois, entered on December 20,, 1988, and this court's jurisdiction is vested under 28 U.S.C. Section 158(d). The Notice of Appeal was filed January 18, 1989.

The appellant seeks a remand to the United States Bankruptcy Court vacating its final Order dismissing the Debtor's Complaint to Determine Dischargeability

of a Debt and for a trial on the merits.

STATUTES INVOLVED

In pertinent parts section 523(a)(1)(C) and 523(a)(7)(A) and (B) of the United States Bankruptcy Code, 11 U.S.C. Section 523:

> Section 523. Exceptions to discharge
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt ---
>
> (1) for a tax or a customs duty
>
> * * *
>
> (c) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

* * *

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to an for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty ---

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(b) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

STATEMENT OF THE CASE [1]

On June 24, 1980, the defendant-appellee, COMMISSIONER OF INTERNAL REVENUE (COMMISSIONER), sent the

plaintiff-appellant, THOMAS V. CASSIDY (DEBTOR), a Notice of Deficiency in Federal Income Taxes for the fiscal years ending August 31, 1974 and August 31, 1975. (App. p.20). The deficiencies were in the amounts of $12,865.00 and $22,028.00, respectively. The COMMISSIONER also determined that some portion of the underpayment was due to fraud, and pursuant to Section 6653(b) of the Internal Revenue Code, assessed civil fraud penalties of $11,774.00 for 1974 and $11,014.00 for 1975 (App. p.20). The DEBTOR filed a Petition with United States Tax Court for redetermination of his income tax liability. (App. p.11).

A Petition for Bankruptcy under Chapter 7, 11 U.S.C. Section 701 et. seq., was filed against the DEBTOR on

February 14, 1983. On December 22, 1983, the bankruptcy court entered an order directing that objections to discharge pursuant to 11 U.S.C. Section 727(a) and complaints to determine dischargeability of a debt pursuant to 11 U.S.C. Section 523(c) be filed by March 12, 1984. (App. p.43). On March 13, 1984, a Discharge of Debtor Order was entered by the bankruptcy court. (App. p.5). Prior to discharge the COMMISSIONER filed his claim and on January 29, 1986, was allowed to receive as a priority claimant a distribution in the amount of $2,782.50 from the DEBTOR'S bankrupt estate. (App. p.45).

One month after discharge, the bankruptcy court lifted order the automatic stay previously in effect in

the DEBTOR'S bankruptcy so that the tax court proceedings could go forward.

In the tax court proceedings the COMMISSIONER mailed to the DEBTOR a Request for Admissions of Fact. The DEBTOR did not respond within the requisite time period and the COMMISSIONER moved for summary judgment based upon the matters deemed to be admitted. (App. p.10-12). The tax court found that the deemed admission of fact in the Request to Admit supported the deficiencies determined by the COMMISSIONER, and granted the Motion for Summary Judgment finding that

We therefore find that the facts deemed admitted under Rule 90(c) are sufficient to satisfy respondent's [COMMISSIONER'S] burden of proving that

some portion of the understatement of income was due to fraud with the intent to evade tax.
(App. p.18)

The DEBTOR appealed to this court from the Order and Decision of the tax court. The decision of the tax court was affirmed in Cassidy v. C.I.R., 814 F.2s 477 (7th Cir. 1987) (attached to Appendix beginning at p.19).

On November 17, 1987, the DEBTOR filed in the United States Bankruptcy Court, Central District of Illinois, his Complaint to Determine Dischargeability of Debt relating to the deficiencies assessed by the COMMISSIONER and redetermined by the tax court for the tax periods ended August 31, 1974, and August 31, 1975. (App. p.2). The COMMISSIONER filed his

Motion to Dismiss the Complaint on the basis that the issue of dischargeability had already been determined in the tax court proceedings and subsequent review by this court. The COMMISSIONER relied on the Doctrine of Res Judicata in its Motion to Dismiss. (App. p.7). On February 2, 1988, the bankruptcy court entered its Order allowing the Motion to Dismiss and an appeal followed to the United States District Court, Central District of Illinois. (App. p.25). The District Court affirmed the bankruptcy court with its judgment and Opinions on December 20, 1988, relying principally on the doctrine of collateral estoppel. (App. p.28 and A. p.2). This appeal followed.

ARGUMENT

I.

THE DECISION AND ORDER OF THE TAX COURT HAS NO PRECLUSIVE EFFECT IN THE BANKRUPTCY DISCHARGE PROCEEDING

The bankruptcy court dismissed the DEBTOR'S Complaint to Determine Dischargeability of a Debt based on the assertion that the question had been adjudicated by the tax court in its assessment proceeding the affirmed on review by this court in Cassidy v. Commissioner, 814 F.2d 477 (7th Cir. 1987), thus invoking the doctrine of Res Judicata. (App. p.7). The U.S.District Court affirmed relying on the doctrine of collateral estoppel. (App. p.28 and A. p.2).

It is to be emphasized that the DEBTOR in bringing his Complaint to Determine Dischargeability is not attempting to relitigate the COMMISSIONER'S assessment of the taxes and penalties and redetermination by the tax court and this court's review of those proceedings. Rather, the DEBTOR is merely seeking a hearing for a determination of whether that liability, as established, is dischargeable under the Bankruptcy Code.

The decision of the tax court and its finding do not preclude litigation of the issues raised in the DEBTOR'S Complaint to Determine Dischargeability.

The tax court proceeding is nothing more than the determination of a

liability existing against a taxpayer. The COMMISSIONER makes an assessment of a tax deficiency, which is an administrative determination of liability. See generally Abel v. Campbell, 334 F.2d 339, 342-43 (5th Cir. 1964). The tax court is the forum with limited jurisdiction to redetermine the deficiency or liability assessed. Graham v. Commissioner, 75 T.C. 389, 399 (1980).

Here the DEBTOR petitioned the tax court for a redetermination of the deficiencies assessed by the COMMISSIONER. The tax court granted the COMMISSIONER'S "Motion for Summary Judgment . . . as to the deficiencies and additions to tax for fraud in the amounts stated." (App. p.18).

In order for res judicata to apply there must be:

1. identity of the thing being sued upon;

2. identity of the cause of action;

3. identity of persons and parties; and

4. identity of capacity of a party to sue or be sued.

In re Goodman, 25 B.R. 932, 938 (Bkrtcy. N.D. Ill. 1982).

Since res judicata requires an identity of the cause of action, it is also known as "claim preclusion." Goodman, supra at 935. In this case the doctrine of res judicata is not applicable. There is no identity of the cause of action. The tax court merely assessed the deficiencies (or established the liability) against the

DEBTOR. The bankruptcy proceeding was brought to determine whether the deficiencies (or liability) assessed was dischargeable.

The distinct, but sometimes confused, doctrine of collateral estoppel was never raised by the COMMISSIONER to support its Motion to Dismiss in the bankruptcy court. However, the U.S. District Court relied on collateral estoppel principles in affirming the bankruptcy court.

The elements of collateral estoppel are:

1. the issue sought to be precluded must be the same issue as that involved in the prior action;

2. the issue must have been actually litigated;

3. the issue must have been determined by a valid and final judgment; and

4. the determination must have been essential to the final judgment. In re Goodman, 25 B.R. 932, 939 (Bkrtcy, N.D. Ill. 1982). Since collateral estoppel focuses on issues, rather than the cause of action, it is also know as "issue preclusion." Goodman, supra, at 935.

A.

The Doctrine of Res Judicata Does Not Apply to the Bankruptcy Court Discharge Proceeding.

Res Judicata requires an identity of the cause of action. The "cause of action" in the tax court to redetermine an assessment of tax deficiencies is not identical to the bankruptcy court's

determination of whether the deficiencies assessed are dischargeable.

Since it was the intent of Congress to have the bankruptcy court adjudicate the dischargeability of a debt *res judicata* has no application, notwithstanding the nature of the tax court proceeding. In *re Goodman*, 25 B.R. 932 (Bkrpty. N.D. Ill. 1982), the bankruptcy court considered whether a California default judgment based on fraud was dischargeable. The plaintiff/creditor argued that since Section 523(a)(2)(A) of the Bankruptcy Code renders a debt based on fraud nondischargeable, the debt based on the California judgment should be nondischargeable and that principles of *res judicata* and collateral estoppel

should be applies. Goodman, supra at 934. The court held that neither res judicata nor collateral estoppel applies. In resolving the issue of whether the doctrine of res judicata should apply the court stated:

The United States Supreme Court, in Brown v. Felson, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), addressed the issue of whether res judicata applied to a dischargeability proceeding in the 'bankruptcy court under Section 17 of the prior Bankruptcy Act. In resolving a conflict among the circuits the Court held that res judicata did not apply and that the bankruptcy court is not confined to a review of the judgment and record in the prior state court proceeding when considering the

dischargeability of respondent's debt.' Id. at 138-39, 99 S.Ct. at 2212-13. The Court reasoned that Congress intended for the bankruptcy court to resolve dischargeability issues and that by limiting the application of res judicata, the bankruptcy court would be able to weigh all the evidence and accurately determine whether the debtor did in fact commit deceit, fraud, or malicious conversion. Id. at 138, 99 S.Ct. at 2212.

Although Brown involved Section 17 of the prior Bankruptcy Act, Brown's rationale has been universally applied to dischargeability proceedings under Section 523 of the Bankruptcy Code. See e.g. In re Dohm, 10 B.R. 132 (Bkrtcy. N.D. Ill. 1981); In re Spector, 22 B.R. 226 (Bkrtcy. N.D.N.Y.

1982); In re Supple, 14 B.R. 898 (Bkrtcy. D. Conn. 1981). Accordingly, this court holds that res judicata does not limit this court to the California judgment and record in determining the dischargeability of the debt arising from the California judgment.

Goodman supra at 938-39.

In this case, the bankruptcy court's dismissal of the DEBTOR'S Complaint to Determine Dischargeability of a Debt by limiting itself to the decision in the tax court under principles of res judicata is err.

B.

None of the Elements of Collateral Estoppel Exist.

1. The issues sought to be precluded in the bankruptcy

court discharge proceeding is to the same issue involved in the tax court.

The COMMISSIONER based his Motion to Dismiss on the proposition that under Section 523(a)(1)(C) a debtor is not discharged from a tax with respect to which the debtor made a fraudulent return or willfully attempted to evade the tax, and the tax court (and this court on review) already adjudicated the issue. But the amount of the deficiencies related to fraud involved in the tax court are different than the amount of those deficiencies sought to be determined nondischargeable as a result of fraud in the bankruptcy court.

Section 523(a)(1)(C) provides ad follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -----

(1) for a tax or a customs duty-

* * *

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

Thus, the taxes that are nondischargeable are only those related to the fraud. If only a portion of the tax deficiencies assessed against the DEBTOR by the tax court are related to fraud, then only that portion is

nondischargeable. The remainder of the deficiencies would be discharged.

The tax court, in redetermining the assessment against the DEBTOR never addressed the issue of what portion of the deficiencies was related to fraud. Specifically, the tax court held

> We therefore find that the facts deemed admitted under Rule 90(c) are sufficient to satisfy respondent's burden of proving that <u>some portion</u> of the understatement of income was due to fraud with the intent to evade tax. (emphasis added).

(App. p.18).

The tax court never considered the issue of what portion of the deficiencies was due to fraud. Such a determination is not necessary when imposing civil fraud penalties under

section 6653(b) of the Internal Revenue Code. Section 6653(b)(2) states as follows:

> (2) DETERMINATION OF PORTION ATTRIBUTABLE TO FRAUD.---- If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer established is not attributable to fraud.

If $1.00 of the underpayment assessed against the DEBTOR was attributable to fraud then the entire underpayment is treated as attributable to fraud when determining civil fraud penalties. The only issue addressed by the tax court

was whether "some portion" of the deficiencies assessed was due to fraud. However, in the bankruptcy court discharge proceeding the portion of the underpayment attributable to fraud must be ascertained. There is no presumption that if $1.00 of the entire debt under consideration is attributable to_fraud, then the entire debt is nondischargeable.

In determining whether a particular debt falls within one of the exceptions of Section 523 the statute should be strictly construed against the objecting creditor (COMMISSIONER) and liberally in favor of the debtor. 3 Collier on Bankruptcy (15th Edition) Par. 523.05A, p. 523.15. Accordingly, under section 523(a)(1)(C), if only "some portion" of a tax is found to be

attributable to fraud, then only "some portion" of the entire debt is nondischargeable. The remainder is discharged.

The determination of what portion of the tax deficiencies are related to fraud was never made in the tax court. It is an issue that must be addressed in the bankruptcy court discharge proceeding and accordingly, collateral estoppel cannot apply.

2. The issue of fraud was never actually litigated in the Tax Court proceeding.

The second element necessary to invoke the doctrine of collateral estoppel is that the issue sought to be precluded must have been actually litigated in the prior proceeding. In re Goodman, 25, B.R. 932, 939 Bkrtcy.

N.D.Ill. 1982). The issue of whether the underpayment of tax was due to fraud was not actually litigated in the tax court. Rather, the tax court granted the COMMISSIONER'S Motion for Summary Judgment based solely on facts recited in a request for admission that were deemed admitted due to DEBTOR'S failure to respond within 30 days of service. (App.pp.16-17). The finding of fraud was, in essence, determined by a default.

In Goodman it was held that the California judgment based on fraud could not preclude litigation of the fraud issue in the bankruptcy court discharge proceeding because the California judgment was obtained by default. The court said

In the case at bar, the California judgment was procured by default. Consequently, the issues therein were not actually litigated. Since the second element of collateral estoppel is not satisfied, this court holds that it is not bound by the issues decided in the California judgment through the operation of collateral estoppel. Thus, the issue of whether the debt due to the plaintiff stems from "actual fraud" by the debtor must be reexamined by this court. Accord In re Iannelli, 12 B.R. 561, 563 (Bkrtcy., S.D.N.Y. 1981) ("the doctrine of collateral estoppel does not bar relitigation by [the bankruptcy court] of the issues included in the default judgment"). Goodman, supra at 939

Likewise, in this case, since the deemed factual admissions to support the summary judgment were procured by default in the tax court, the issue of fraud has not been actually litigated.

3. Any fraud issue adjudicated by the tax court was not determined by a valid judgment as related to issues of dischargeability.

Assuming arguendo, that the first and second elements of collateral estoppel exists, any issues relating to fraud decided by the tax court is not a valid judgment to be recognized by the bankruptcy court in a discharge proceeding. To be a valid judgement for purposes of applying res judicata or collateral estoppel principles the prior adjudication must be from a court of competent jurisdiction. See Local

1006 v. Wirf, 558 F.Supp. 230 (N.D. Ill. 1982) affirmed 746 F.2d 1483 (7th Cir. 1984). The tax court has no subject matter jurisdiction to determine issues of dischargeability.

The tax court is a tribunal of limited jurisdiction. It is purely a creature of statute and has only the power given to it by Congress. In establishing the tax court as an administrative body Congress severely limited its jurisdiction. Continental Equities, Inc., v. C.I.R., 551 F.2d 74 (5th Cir. 1977); Smiths Estate v. C.I.R., 638 F.2d 665 (3d Cir. 1981); Handlehand v. C.I.R., 519 F.2d 127 (9th Cir. 1975).

The bankruptcy court has original jurisdiction to hear and determine whether the claimed deficiencies are

dischargeable and, under the circumstances of this case, that court's original jurisdiction together with the fact that the tax court is a Constitutional Article I court with narrowly circumscribed adjudicatory power makes the jurisdiction of the bankruptcy tribunal exclusive. [See and compare: Northern Pipeline Construction Co., v. Marathon Pipe Line Co., 458 U.S. 50].

Footnote 3 of the tax court's Opinion constitutes self recognition that it lacked the power and jurisdiction to independently construe the propositions of the Bankruptcy Act and adjudicate that these taxes and penalties had not been discharged. It reads in relevant part:

> Moreover, the redetermination of an income tax deficiency has "nothing to do with collection of the tax nor any similarity to an action for collection of a debt * * *." Swanson v. Commissioner, 65 T.C. 1180, 1184, (1976). Accordingly, if there is any question as to the collectability of any income tax deficiencies, which we doubt, that question is beyond the jurisdiction of this Court. Graham v. Commissioner, 75 T.C. 389, 399 (1980).

(App. p.12).

In Graham v. Commissioner, 75 T.C. 389 (1980), the tax court redetermined deficiencies in taxes against the taxpayer, but refused to decide whether the deficiencies and additions to tax were discharged in the taxpayer's

bankruptcy proceeding. The court held as follows:

> We turn next to petitioner's primary contention that his Federal income tax liability for 1972 and 1973 was discharged on February 7, 1978, when his Petition for voluntary bankruptcy was granted. Respondent argues that this Court does not have jurisdiction to decide whether the income tax deficiencies and additions to tax were discharged in the bankruptcy proceeding. We agree with the respondent. The tax court has limited jurisdiction and its powers do not exceed those conferred by statute. See Continental Equities Inc. v. Commissioner, [77-1 USTC 9375], 551 F.2d 74, 79-80 (5th Cir. 1977); Transport Manufacturing &

Equipment Co. v. Commissioner, [70-2 USTC 9627], 434 F.2d 373, 381 (8th Cir. 1970); Jefferson Loan Co. V. Commissioner, [57-2 USTC 10, 034], 249 F.2d 364.366 (8th Cir. 1957); Burns, Stix Friedman & Co. v. Commissioner, [Dec. 31,114], 57 T.C. 392, 396 1971)]. The redetermination of an income tax deficiency has "nothing to do with collection of the tax nor any similarity to an action for collection of a debt, nor does it involve any other rights and remedies of the sort traditionally enforced in action at law." Swanson v. Commissioner, [Dec. 33,742], 65 T.C. 1180, 1184 (1976). And, in exercising its jurisdiction to redetermine deficiencies the tax court cannot "allow or disallow a

claim against a debtors estate based on a deficiency in taxes or to discharge taxes as a bankruptcy court might." Fotochrome, Inc. v. Commissioner, [Dec. 31,311], 57 T.C. 842, 847 (1972) (emphasis added). Graham, supra at 399.

In the case at bar, any adjudication of fraud by the tax court as it might relate to the bankruptcy court discharge proceeding is beyond the tax court's jurisdiction. Accordingly, the tax court order and decision cannot be a basis to preclude litigation of dischargeability of the DEBTOR'S tax deficiencies and additions thereto in the bankruptcy court.

4. The Court of Appeals discussion on review of the tax court decision as it relates to

discharge was not essential to its decision.

The final element of collateral estoppel is that the determination of an issue in a prior proceeding must have been essential to the final judgment. Any discussions or decisions with respect to dischargeability of the DEBTOR'S tax deficiencies, either in the tax court Opinion or this court's Opinion in Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987) are not essential to the tax court's final judgment. The tax court merely redetermines deficiencies previously assessed by the COMMISSIONER. This simply establishes a liability notwithstanding any issues relating to discharge in bankruptcy.

The DEBTOR introduced the issue of dischargeability in the tax court.

However, this cannot confer on the tax court subject matter jurisdiction to decide it when such jurisdiction does not otherwise exist. Moreover, the tax court did not adjudicate the dischargeability issue. It merely stated that, notwithstanding the underlying merits relating to dischargeability, it was not a defense and it had no jurisdiction to consider it in an assessment proceeding. (App. p. 12).

Nevertheless, this court states in its Opinion on review of the tax court proceeding that

> Moreover, subsection 523(a)(7)(A) mandates that fraud penalties are nondischargeable if the underlying tax with respect to which the penalty was imposed is also nondischargeable.

S.Rep. No. 989 at 79, U.S. Code Cong. & Admin.News 1976, p. 5864. Because the taxpayer's deficiencies are nondischargeable, his tax penalties are similarly nondischargeable. Thus, we find the taxpayer's contention that his deficiencies and penalties were discharged to be without merit.

Cassidy v. C.I.R., 814 F.2d 477, 481 (7th Cir. 1987), (App. p. 23). To the extent that this court referred to the issue of dischargeability it is merely dictum. General expressions that go beyond the issues in a case, while respected, should not control judgment in subsequent suit. U.S. v. Zuskar, 237 F.2d 528 (7th Cir. 1956). This court's review and affirmance of the tax court did not need to consider

issues of dischargeability. The tax court itself refused to decide issues of dischargeability as being beyond its subject matter jurisdiction.

In any event, while consideration of the issue of dischargeability may have been proper in the context it was brought before this court (as a defense to the tax court assessment proceeding) it should not be a basis to deny the DEBTOR a hearing on the issues raised in the Complaint to Determine Dischargeability.

Thus, while the language concerning dischargeability of this court commands respect, it does not concern an issue essential to its decision. Absent such an element, it does not constitute a prior adjudication sufficient to invoke the doctrine of collateral estoppel in

the bankruptcy court's discharge proceeding.

II.

THE PENALTIES RELATED TO THE ASSESSED TAX DEFICIENCIES ARE DISCHARGEABLE AS A MATTER OF LAW.

The assessment against the debtor as determined by the COMMISSIONER, and as redetermined by the tax court, included civil fraud penalties of $11,774.00 for 1974 and $11,014.00 for 1975. (App. p. 11). The question of whether these penalties are discharged as a matter of law was never presented to or adjudicated by the tax court. However, this court in its review of the tax court decision addressed the issue and stated that "Section 523(a)(7)(A) mandates that fraud penalties are

nondischargeable if the underlying tax with respect to which the penalty was imposed is also nondischargeable. S.Rep. No. 989 at 79, U.S. Code Cong. & Admin. News 1976, p. 5864. Because the taxpayer's deficiencies are nondischargeable, his penalties are similarly nondischargeable." Cassidy v. C.I.R., 814 F.2d 477, (7th Cir. 1987). (App. p.23).

While this court addressed the issue of the dischargeability of penalties under section 523(a)(7)(A) neither it nor the tax court considered whether the penalties are dischargeable as a matter of law under Section 523(a)(7)(B). This is an issue that can and should be raised under the Complaint to Determine Dischargeability filed in the bankruptcy court.

Section 523(a)(7) provides in relevant part:

523(a)(7)

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt -

(7) to the extent such debt is for a . . . penalty . . . other than a tax penalty -

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

If the penalties come within either of these exceptions they are

dischargeable. In the well reasoned opinion of Roberts v. Internal Revenue Service, Adv. No. 88-0188-C (Bkrpty. N.D. Okl. 1989) (included in the Appendix to this brief at p. 16), the bankruptcy court held that

> This court believes that the argument of the IRS and the cases which support it are clearly wrong. The IRS contends that because the penalties in the instant case are not dischargeable pursuant to subsection (A) they are nondischargeable. This is a nonsequitur. Just because penalties are not dischargeable under subsection (A) does not mean that they cannot be dischargeable under subsection (B). The two subsections operate independent of each other. The debtors need only prove that the

penalties in questions come under one of the subsections to prevail There is nothing in the Code to suggest that if the taxes are not dischargeable pursuant to subsection (A) they cannot be dischargeable pursuant to subsection (B).

In the instant case the penalties in question clearly refer to transactions or events that happened more than three years prior to the filing of the Petition and are therefore covered by subsection (B) and are dischargeable.

Likewise, in the case at bar, the penalties in question clearly refer to transactions or event (1974 & 1975) that happened more than three years prior to the filing of the Petition. Accordingly, they are dischargeable in

bankruptcy as a matter of law under section 523(a)(7)(B) and the bankruptcy court should have the opportunity to consider this issue when considering the Complaint to Determine Dischargeability.

III.

AS A MATTER OF POLICY AND JUDICIAL ECONOMY, IN ADDITION TO THE LEGAL AND FACTUAL CONSIDERATIONS, THE COMMISSION IS ESTOPPED FROM CLAIMING THE TAX LIABILITIES NONDISCHARGEABLE AND/OR PREVENTING THE BANKRUPTCY COURT FROM DETERMINING THE ISSUE.

The COMMISSIONER filed his Proof of Claim in the bankruptcy proceeding and shared in the distribution of the bankrupt estate. (App. pp. 45-56). At no time did the COMMISSIONER object to

the debtor's discharge contrary to 11 U.S.C. Section 727(a) and (c)(1), nor file his own Complaint to determine dischargeability of the tax liabilities, when a portion of the COMMISSIONER'S Proof of Claim contained allegations of fraud and deficiencies for fraud. The record shows that the COMMISSIONER never brought to the attention of the bankruptcy trustee or court its position that the subject tax liabilities were nondischargeable. On December 22, 1983, the bankruptcy court ordered that objections to the discharge of debtor pursuant to 11 U.S.C. Section 727(a) and Complaints to determine dischargeability of a debt pursuant to 11 U.S.C. Section 523(c) be filed on or before March 12, 1984. (App. pp. 43-44). Where the Proof of

Claim contained allegations of fraud, the COMMISSIONER made no such filing. On March 12, 1984, the bankruptcy court entered its Order of Discharge, discharging all debts, including taxes over three years old. (App. p.5). Notwithstanding its conduct before the bankruptcy court, the COMMISSIONER maintains that he is entitled to pursue the DEBTOR'S post-discharge assets on the basis that the tax liabilities were never discharged.

The debtor acknowledges that section 727(a) and section 523(c) do not directly mandate but allow and encourage a creditor to file an objection or a complaint to determine dischargeability when the asserted basis of nondischargeability is in Section 523(a)(1)(C) and where fraud is

alleged. However, notwithstanding the lack of a direct statutory mandate, the overall purpose of the Bankruptcy Code and the public policy related thereto requires the COMMISSIONER to raise the fraud issue before the bankruptcy court prior to discharge and sharing in a distribution of the estate. In this case the COMMISSIONER was the only creditor who participated in the distribution of the bankrupt estate.

In Gwillim v. United States, 519 F.2d 407 (9th Cir. 1975), the court condemned the practice of the IRS in failing to file proofs of claim, and thereby submit to the jurisdiction of the bankruptcy court in order to permit the court to adjudicate all issues related to the tax liability. As suggested in Gwillim, it was the

apparent practice of the IRS to ignore a bankruptcy proceeding, and then after discharge proceed against the debtor's post discharge assets claiming that the bankruptcy court never adjudicated the issue of dischargeability.

The Gwillim court rejected such a practice stating that

> This appeal presents the recurring confrontation between the IRS and the bankruptcy trustees which results from the adamant refusal of the IRS to present claims for or otherwise prove unpaid items in bankruptcy proceedings and the trustee's statutory duty to expediently wind up the Bankrupt's estate and be discharged under a timely appropriate order of closure. Such refusal and non-action by IRS is apparently an

attempt to avoid the Bankruptcy Court's determination of the Bankrupt's federal tax lability and indebtedness and the ultimate discharge in bankruptcy of a Bankrupt's eligible tax indebtedness and we believe is directly opposed to the expressed language of section 35(a)(c), [now Section 523(c)] and the policy flowing therefrom to allow a Bankrupt to start over and to enhance the individual's chances of financially rehabilitating himself by eliminating his old tax debt. (citations omitted).

Gwillim, supra at 409. The Gwillim court went on to state that

It is manifest to us that the purpose of Congress in enacting section 35(c) [now Section 523(c)] was to provide

> both the Bankrupt and IRS with the option to utilize the bankruptcy court forum in which the effect of the discharge of a federal tax indebtedness could be definitively determined and adjudicated in a uniform fashion and to grant the bankruptcy court jurisdiction for that purpose. To conclude that the above option in favor of the Bankrupt could be utilized only if the IRS had filed a claim for the unpaid tax would distort and render meaningless the clearly expressed congressional language.

Gwillim, supra at 411012. This court has adopted the reasoning of Gwillim in Matter of Neavear, 674 F.2d 1291 (7th Cir. 1982) and McKenzie v. United States, 536 F.2d 726 (7th Cir. 1976).

See also In re Durensky, 377 F.Supp. 798 (N.D.Tx. 1974).

The COMMISSIONER has amended its practice of failing to file Proof of Claims and otherwise appear before the bankruptcy court to finally determine all questions related to tax liabilities of the debtor. Here, the COMMISSIONER filed his Proof of Claim, proved it up before the bankruptcy court, and solely shared in a distribution of 59% of the bankrupt estate as a priority creditor. (App. p. 45). However, at no time did the COMMISSIONER indicate to the bankruptcy court that it was his position that the taxes would remain nondischargeable, and subject the debtor's post discharge assets to execution. The practice as used in this case violates the intended

purpose of the Bankruptcy Code and public policy related thereto as did the prior practice.

The COMMISSIONER'S questionable conduct allowed the bankruptcy court to enter an Order of Discharge without objection or raising the issue of dischargeability. This clearly frustrates the purpose of the Bankruptcy Code to expediently wind up the Bankrupt's estate and to be discharged under a timely and appropriate Order of closure. Like the circumstances found in Gwillim, the non-action by the COMMISSIONER is an attempt to avoid the bankruptcy court's determination of the bankrupt's federal tax liability and indebtedness and the ultimate discharge in bankruptcy of a bankrupt's eligible tax indebtedness.

This is contrary to the intent of the Bankruptcy Court in allowing the debtor to start over and to enhance his chances of financially rehabilitating himself by eliminating old tax debts.

While the COMMISSIONER may argue - the DEBTOR does not - the conduct of the COMMISSIONER in the bankruptcy proceeding below is not contrary to direct statutory mandates, it clearly frustrates the intended purpose of the Bankruptcy Code, and public policy found therein, and he is judicially and collaterally now estopped from claiming that the tax liabilities as assessed by the tax court are nondischargeable, or at least estopped equitably from preventing the bankruptcy court the opportunity to exercise its jurisdictional function of determining

dischargeability of debts, especially under circumstances when the tax court has refused to recognize such jurisdiction.

It is ironic that the COMMISSIONER would argue that the bankruptcy court is precluded from considering the merits of the debtor's Complaint to Determine Dischargeability under the Doctrines of res judicata or collateral estoppel. The primary purpose of those doctrines is to enhance judicial economy by preventing relitigation of issues decided in prior proceedings. However, the conduct of the COMMISSIONER in the debtor's bankruptcy proceeding was such that frustrates the concept of judicial economy. Had the COMMISSIONER brought to the attention of the bankruptcy

court that it was his position that the subject tax liabilities were nondischargeable, the issue could have been adjudicated at the time that he presented his proof of claim and shared in the distribution of the bankrupt estate. However, by failing to bring the issue before the bankruptcy court, it was not resolved at a time when all relevant matters were or could have been brought before the court.

CONCLUSION

For the foregoing reasons and for others implicit therein, the plaintiff-appellant prays that this court find and enter judgment that the subject tax liabilities are dischargeable and discharged. In the alternative, he prays that the judgment of the bankruptcy court be reversed and the

case remanded for an appropriate trial on the merits.

RESPECTFULLY SUBMITTED,

Timothy J. Cassidy
CASSIDY & MUELLER
1510 Savings Center Tower
Peoria, IL 61602
Telephone: 309/676-0591
Attorneys for plaintiff-
appellant

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1121

IN RE	)	
	)	
THOMAS V. CASSIDY,	)	Appeal
	)	from the
Debtor.	)	United
	)	States
	)	District
THOMAS V. CASSIDY,	)	Court,
	)	Central
Plaintiff-Appellant,	)	District
	)	of
vs.	)	Illinois
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Defendant-Appellee.	)	

APPENDIX TO
APPELLANT'S BRIEF

Timothy J. Cassidy
CASSIDY & MULLER
1510 Savings Center Tower
Peoria, IL 61602
Telephone: 309/676-0591

Attorneys for plaintiff-appellant

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE: Case No. 183-00222	)	
	)	
THOMAS V. CASSIDY,	)	
	)	
Debtor.	)	
	)	Adv. No.
THOMAS V. CASSIDY,	)	87/8250
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Defendant	)	

COMPLAINT TO DETERMINE

DISCHARGEABILITY OF A DEBT

THOMAS V. CASSIDY, the plaintiff, by his attorneys, CASSIDY & MULLER, for his Complaint against Commissioner of Internal Revenue to Determine Dischargeability of a Debt, states as follows:

1. This proceeding is brought pursuant to United States Bankruptcy Rule 4007.

2. The plaintiff, THOMAS V. CASSIDY, filed his petition herein commencing a case under title 11, United States Code on February 14, 1983, and an order for relief was entered under chapter 7.

3. On March 13, 1984, this court entered an order of Discharge of Debtor, wherein the plaintiff was released from all dischargeable debts. A copy of the Order of Discharge is attached and made a part hereof as Exhibit "A".

4. On page 2 of schedule A-3 of plaintiffs petition filed herein, debts due Internal Revenue Service for income taxes due more than three (3) years

before February 14, 1983, were duly scheduled.

5. On or about August 17, 1987, the defendant prepared and caused to be filed a "Notice of Federal Tax Lien under Internal Revenue Laws." The lien filing relates to a claim for federal income taxes for the tax period ending August 31, 1974 and August 31, 1975, and states as follows:

> As provided by section 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property

and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

A copy of the "Notice of Federal Tax Lien" is attached and made a part hereof as Exhibit "B".

6. The income taxes assessed for the periods ended August 31, 1974 and August 31, 1975, which the defendant claims as a liability against plaintiff and demands payment, is and has been discharged under chapter 7 of the Bankruptcy Act.

7. The order of Discharge of Debtor entered on March 13, 1984, provides that

.All creditors whose debts are discharged by this order and all creditors whose judgments are

declared null and void by paragraph 2 above be and they hereby are enjoined from commencing, continuing or employing any action process or act to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived.

The acts of the defendant, a creditor as of February 14, 1983, described above, and all other acts to collect, recover or offset the assessed income taxes as a personal liability of the plaintiff or from property of the debtor should be enjoined.

WHEREFORE, the plaintiff, THOMAS V. CASSIDY, prays for an order whereby

a. the federal income taxes assessed for the tax periods ended August 31,

1974 and August 31, 1975, and related penalties, interests and costs be declared and specifically recognized as a dischargeable debt under the March 13, 1984 order of Discharged of Debtor, entered in Case No. 183-00222, United States Bankruptcy Court, Central District of Illinois;

b. the defendant be forever enjoined from commencing, continuing or employing any action, process or act to collect, recover or offset the debt of federal income taxes assessed for the tax periods ended August 31, 1974 and August 31, 1975, as a personal liability of THOMAS V. CASSIDY, or from property of THOMAS V. CASSIDY;

c. the defendant be temporarily enjoined or stayed from commencing,

continuing or employing any action, process or liability of the plaintiff, or from property of the plaintiff, until such time that the dischargeability of the described income taxes is finally determined; and

d. for such other relief as is deemed just.

CASSIDY & MULLER

By:_____

Attorneys for the plaintiff,
THOMAS V. CASSIDY

Timothy J. Cassidy
CASSIDY & MULLER
1510 Savings Center Tower
Peoria, IL 61602
Telephone: 309/676-0591

UNITED STATES

BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT

OF ILLINOIS

IN RE

CASSIDY, Thomas V. SS# 322-26-5280
5813 N. Imperial Drive Case No.
Peoria, Il 61602 183-00222

Debtor*

DISCHARGE OF DEBTOR

It appearing that the person named above has filed a petition commencing a case under title 11, United States Code on the 14th day of February, 1983, that an order for relief was entered under chapter 7 and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor

was filed and, after due notice and hearing, was not sustained], it is ordered that

1. The above-named debtor be and he [or she] hereby is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court be and it hereby is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under 11 U.S.C. Section 523;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from the discharge under clauses (2), (4) and (6) of 11 U.S.C. Section 523.

3. All creditors who debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above be and they hereby are enjoined from commencing, continuing or employing any action, process or act to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived.

Dated: March 13, 1984

BY THE COURT

_____

Bankruptcy Judge

EXHIBIT "A"

UNITED STATES BANKRUPTCY COURT

FOR THE

CENTRAL DISTRICT OF ILLINOIS

IN RE:	)	Case No.)
183-00222		
THOMAS V. CASSIDY,	)	
	)	
Debtor.	)	
	)	Adv. No.
THOMAS V. CASSIDY,	)	87-8250
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
COMMISSIONER OF INTERNAL	)	
REVENUE,	)	
	)	

Defendant)

MOTION TO DISMISS COMPLAINT
TO DETERMINE DISCHARGEABILITY OF A DEBT

COMES NOW the United States of America, by its attorney, J. William Roberts, United States Attorney for the Central District of Illinois, on behalf of its agency, the Internal Revenue Service, and moves that this adversary proceeding be dismissed, pursuant to the Doctrine of Res Judicata, and in support thereof, states as follows:

1. The taxes which are in controversy are the same taxes which were addressed by the United States Court of Appeals in Cassidy v. Commissioner, 814 F.2d 477 (7th Cir. 1987).

2. The Court of Appeals stated:

A. Dischargeability of the Deficiencies and Penalties

The taxpayer first argues that his tax liabilities and fraud penalties were discharged in chapter 7 bankruptcy proceeding.

. . .

Because the taxpayer's deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders them nondischargeable. As the legislative history of this section makes clear, the "date of the taxable year with regard to which the fraud occurred is immaterial".

814 F.2d at 480 (emphasis from original text).

3. The debtor has not applied for, or obtained, a Writ of Certiorari from the United States Supreme Court, for

the purpose of obtaining review of the opinion of the United States Court of Appeals.

WHEREFORE, it is prayed that his motion be granted, and for such other relief as is just and appropriate.

Respectfully submitted,

J. WILLIAM ROBERTS
UNITED STATES ATTORNEY

BY:_____
L. LEE SMITH
Assistant United States
Attorney

BY:_____
DAVID R. REID
Special Assistant United States
Attorney
Room 720
320 West Washington
Springfield, Illinois 62701
Telephone: (217) 492-4540
(FTS) 955-4540

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion to Dismiss Complaint to Determine Dischargeability of a Debt, has this 11th day of December, 1987, been made upon the following individual by depositing a copy thereof in the United States mail, postage pre-paid, addressed to:

Cassidy & Mueller
1510 Savings Center Tower
Peoria, Illinosi 61602

David R. Reid
Special Assistant United States Attorney

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF ILLINOIS

ORDER FOR MEETING OF CREDITORS AND FIXING TIMES FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING COMPLAINTS TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBTS AND FOR FILING NOTIFICATION AGREEMENTS AND FOR FILING MOTIONS FOR APPROVAL OF REAFFIRMATIONS AND FOR FILING WRITTEN OBJECTIONS TO ABANDONMENT, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

TO THE DEBTOR(S), HIS CREDITORS, AND OTHER PARTIES IN INTEREST: AN ORDER FOR RELIEF UNDER 11 U.S.C. CHAPTER 7 HAVING BEEN ENTERED ON A PETITION RILED BY THE DEBTOR(S) NAMED BELOW, TO WIT:

CASE NO. 183-00222

DATE PET. FLD 02/14/83

RELIEF ORDERED: 12/02/83

DEBTOR(S) CASSIDY, THOMAS V.
5813 N. IMPERIAL DRIVE
PEORIA, ILLINOIS 61602
(SS#) 322-26-5280
(W-SS#)
(EID#)

ATTY: GARY T. RAFOOL, 800 FIRST NTL BK BLD., PEORIA, ILLINOIS 61602 (Phone 309/673/5535)

INTERIM TRUSTEE: WM. H. CHRISTISON, 700 1ST Nt Bk Bldg., Peoria Il 61602 (Phone 309/674-8125)

IT IS ORDERED, and notice is hereby given, that:

1. A meeting of creditors of said debtor(s) pursuant to 11 U.S.C. Section 341(a) SHALL BE HELD AT THIRD FLOOR, ROOM 329 FEDERAL BUILDING, 100 N.E. MONROE, PEORIA ILLINOIS on January 12, 1984 at 3:30 o'clock P.M., AT WHICH TIME DEBTOR(S) SHALL APPEAR IN PERSON FOR THE PURPOSE OF BEING EXAMINED.

* MARCH 12, 1984 is fixed as the LAST DAY FOR FILING DOCUMENTS REFERRED TO IN PARAGRAPHS 2, 3, AND 4 BELOW:

*2. Objections to the discharge of debtor(s) pursuant to 11 U.S.C. Section 727(a).

*3. A Complaint to determine dischargeability of a debt pursuant to 11 U.S.C. Section-523(c).

*4 Motions for approval of Reaffirmations pursuant to 11 U.S.C. Section 524(d) and Reaffirmation Agreements pursuant to 11 U.S.C. Section 524c(1).

CREDITORS WISHING TO OBJECT TO THE ABANDONMENT OF ANY SCHEDULED PROPERTY MUST FILE A WRITTEN OBJECTION WITH THE CLERK <u>WITHIN 15 DAYS</u> FROM THE DATE OF

THE SECTION 341(a) MEETING OF CREDITORS. IF NO OBJECTIONS ARE FILED THE TRUSTEE MAY FILE WITH THE CLERK AN ABANDONMENT OF SUCH PROPERTY AS HE DEEMS APPROPRIATE IN THE CIRCUMSTANCES, AND UPON THE FILING OF SUCH ABANDONMENT, THE PROPERTY SHALL BE DEEMED TO HAVE BEEN ABANDONED.

****

THIS NOTICE CONTINUED ON THE REVERSE SIDE

YOU ARE FURTHER NOTIFIED that:

The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a trustee as permitted by law, elect a committee of creditors, examine the debtor, and

transact such other business as may properly come before the meeting.

AS A RESULT OF THE FILING OF THE PETITION, CERTAIN ACTS AND PROCEEDINGS AGAINST THE DEBTOR AND HIS PROPERTY ARE STAYED AS PROVIDED IN 11 U.S.C. Section 362(a).

If no objection to the discharge of the debtor(s) is filed on or before the last day fixed therefor as stated in subparagraph 2 above, debtor(s) will be granted his discharge. If no complaint to determine dischargeability of a debt under (2), (4) or (6) of 11 U.S.C. Section 523(a) is filed within the time fixed therefor as stated in subparagraph 3 above, the debt may be discharged.

IT APPEARS FROM THE SCHEDULES OF THE DEBTOR THAT THERE ARE NO ASSETS FROM

WHICH ANY DIVIDEND CAN BE PAID TO CREDITORS. IT IS UNNECESSARY FOR ANY CREDITOR TO FILE HIS CLAIM AT THIS TIME IN ORDER TO SHARE IN ANY DISTRIBUTION FROM THE ESTATE. IF IT SUBSEQUENTLY APPEARS THAT THERE ARE ASSETS FROM WHICH A DIVIDEND MAY BE PAID, CREDITORS WILL BE SO NOTIFIED AND GIVEN AN OPPORTUNITY TO FILE THEIR CLAIMS.

UNLESS THE COURT EXTENDS THE TIME, ANY OBJECTION TO DEBTOR'S CLAIM OF EXEMPT PROPERTY (SCHEDULE B4) MUST BE FILED WITHIN 30 DAYS AFTER THE CONCLUSION OF THE MEETING OF CREDITORS.

ALL PERSONS ARE ENJOINED FROM CONTACTING DEBTOR(S) WITHOUT FIRST OBTAINING LEAVE OF COURT OR THE CONSENT OF HIS ATTORNEY.

DATED: DECEMBER 22, 1983

BY THE COURT

MAX J. LIPKIN

BANKRUPTCY JUDGE

INQUIRIES to the Court or to the Trustee as to status or administration of a case and REQUESTS for copies or information from schedules MUST BE BY MAIL AND ACCOMPANIED BY A STAMPED SELF-ADDRESSED ENVELOPE. ADVANCED PAYMENT by check or money order (NO PERSONAL CHECKS) made payable to CLERK, U.S. BANKRUPTCY COURT must be received. Copies are $.50 each page, certification of a document is $2.00 each document, a search of the file is $2.00 each name or each item searched.

PLEASE DIRECT YOUR MAIL TO:

CLERK, U.S. BANKRUPTCY COURT

ROOM 333 FEDERAL BUILDING

100 N.E. MONROE ST.

PEORIA IL 61602

(309) 671-7035

A TRUE COPY

ATTEST:

LILLIAN KENNEDY, Clerk

U.S. Bankruptcy Court Central District

of IL

Date: September 28, 1984

By: Patricia A. Keith, Deputy Clerk

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF ILLINOIS

In re	)	
THOMAS V. CASSIDY,	)	Bankruptcy No.
	)	183-00222
Debtor.	)	

DISTRICT ORDER

TO WILLIAM H. CHRISTISON, TRUSTEE:

This matter coming on for hearing upon the Trustee's final report filed herein on December 12, 1985, pursuant to notice of final meeting of creditors, fixing said hearing on the 24th day of January, 1986; and

This Court having heard the application of the Attorney for the Trustee and having heard evidence and arguments of counsel; and

It appearing unto the Court that you have previously disbursed the sum of

$215.00 and that you now have on hand the sum of $4,535.00;

IT IS HEREBY ORDERED that all costs of administration shall be paid in full; and

IT IS FURTHER ORDERED that priority tax claimant, Internal Revenue Service, shall receive a .033108 dividend with the balance of said funds.

PAYMENT AS FOLLOWS

COSTS OF ADMINISTRATION

CLERK, U.S. BANKRUPTCY COURT
Trustee's copies..... ....$3.00
Trustee's certification...$2.00
TOTAL TO CLERK.....$5.00

WILLIAM H. CHRISTISON
Attorney at Law
700 First Nat'l Bank Bldg.
Peoria, Il 61602
Trustee's fee .....$ 322.50
Attorney for Trustee fee...$1,425.00

CLAIM NO.	PRIORITY TAX CLAIMANT
7	INTERNAL REVENUE SERVICE P.O. Box 1856 Springfield, IL 62705 $84,043.12 filed and

allowed $2,782.50

After making the above payments you will have disbursed the full sum of $4,750.00 realized by you from the assets of said bankrupt estate.

Upon receipt of all cancelled checks and statements from the above account, this estate will be closed and you will be discharged as Trustee.

ENTERED at Peoria, Illinois, this 29th day of January, 1986.

WILLIAM V. ALTENBERGER
U.S. Bankruptcy Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 89-1121

IN RE THOMAS V. CASSIDY, Debtor.	)	Appeal from the United States District Court, Central District of Illinois
THOMAS V. CASSIDY, Plaintiff-Appellant, vs. COMMISSIONER OF INTERNAL REVENUE, Defendant-Appellee.	)	

SUPPLEMENT TO APPELLANT'S BRIEF:

SUPPLEMENT TO APPELLANT'S APPENDIX

TO BRIEF:

CORRECTIONS
and
ADDITIONS

Attorney for Plaintiff-Appellant:
Timothy J. Cassidy, Esq.
CASSIDY & MUELLER
1510 Savings Center Tower
Peoria, Illinois 61602
309/676-0591

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 89-1121

IN RE THOMAS V. CASSIDY, Debtor.	)	Appeal from the United States District Court, Central District of Illinois
THOMAS V. CASSIDY, Plaintiff-Appellant, vs. COMMISSIONER OF INTERNAL REVENUE, Defendant-Appellee.	)	

SUPPLEMENT TO APPELLANT'S BRIEF:
SUPPLEMENT TO APPELLANT'S APPENDIX
TO BRIEF:

CORRECTIONS
and
ADDITIONS

THOMAS V. CASSIDY, Plaintiff-Appellant, pro se per CERTIFICATE OF INTEREST, and with his attorney TIMOTHY

J. CASSIDY, does hereby supplement Appellant's Brief and Appellant's Appendix To Brief heretofore timely and duly filed with the clerk of this Court by the following designated corrections and additions thereto, which at the time made and omitted were inadvertent:

CORRECTIONS:

1. Paragraph II. under "Argument" appearing on "TABLE OF CONTENTS" page of Appellant's Brief:

now reads:

II. THE PENALTIES RELATED TO THE ASSESSED TAX DEFICIENCY ARE NONDISCHARGEABLE AS A MATTER OF LAW.

should read:

II. THE PENALTIES RELATED TO THE ASSESSED TAX DEFICIENCIES ARE DISCHARGEABLE AS A MATTER OF LAW.

So supplemented by correction.

ADDITIONS:

1. At the conclusion of the list of TABLE OF CASES appearing on the INDEX TO CITATIONS page of Appellant's Brief and at the end of the case authorities cited at the conclusion top of page 23's incomplete paragraph there should be included: Zook v. United States, 541 F.2d 220 (9th Cir. 1976).

So supplemented by addition.

2. At the conclusion of the list of STATUTES appearing on the INDEX TO CITATIONS page of Appellant's Brief and at the end of the statutory authorities there cited should appear:

11 U.S.C. sec[s] 523 (c)	22
11 U.S.C. sec[s] 727 (a) and (c)(1)	20

So supplemented by addition.

3. At the conclusion of the list of STATUTES INVOLVED appearing on the STATUTES INVOLVED page 4 of Appellant's Brief and at the end of the statutory authorities there cited should appear:

"In pertinent parts sections 523 (c) and sections 727 (a) and (c)(1) of the United States Bankruptcy Code, 11 U.S.C. are as follows:

Section 523 (c):

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2) (4) or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and hearing, the court determines such debt to be excepted from discharge under

paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section. [Emphasis supplied.]

Sections 727 (a) and (c)(1):

DISCHARGE

(a) The court shall grant the debtor a discharge, unless --

(4)(A) the debtor knowingly and fraudulently, ... in connection with the case -- made a false oath or account;

(c)(1) . . . a creditor may object to discharge under subsection (a) of this section."

So supplemented by addition.

4. Immediately follow page 5 of appellant's Appendix To Brief, which is the DISCHARGE OF DEBTOR Order dated March 13, 1984, per Honorable Max J. Lipkin, Bankruptcy Judge of the United

States Bankruptcy Court for the Central District of Illinois there is here now included the affidavit of Plaintiff-Appellant, THOMAS V. CASSIDY, dated February 27, 1989, designated App. 5(a) and 5(b), and attached hereto, and the memorandum Order to DISCHARGE OF DEBTOR Order dated March 13, 1984, per Honorable Max J. Lipkin, Bankruptcy Judge of the United States Bankruptcy Court for the Central District of Illinois designated App. 5(c) and 5(d), and attached hereto.

So supplemented by addition.

Respectfully Submitted,

Thomas V. Cassidy
Plaintiff-Appellant, pro se per
Certificate of Interest,
and with
ATTORNEY FOR PLAINTIFF-APPELLANT
Timothy J. Cassidy, Esq.
1510 Savings Center Tower
Peoria, Illinois 61602
309/676-0591

CERTIFICATE OF SERVICE

THOMAS V. CASSIDY hereby certifies that he has served a true and correct copy of the foregoing together with attachments hereto upon the attorneys of record herein for Defendant-Appellee at their published address per Federal Express Courier, paid by sender this 7th day of March 1989.

Thomas V. Cassidy,
so certifies.

ATTORNEY FOR:
PLAINTIFF-APPELLANT
Timothy J. Cassidy, Esq.
1510 Savings Center Tower
Peoria, Illinois 61602
309/676-0591

STATE OF GEORGIA

COUNTY OF FULTON

AFFIDAVIT

(Herein designated App.5(a)and 5(b))

THOMAS V. CASSIDY, APPELLANT-PLAINTIFF herein and pro se with counsel, TIMOTHY J. CASSIDY, Attorney at law, being of lawful age deposes and states upon his oath: that the attached two [2] page Memorandum Order to Order of Discharge and signed by the Honorable Max J. Lipkin, United States Bankruptcy Judge for the Central District of Illinois [herein designated "App. 5(c) and 5(d)"] was received by him through the United States mail at his then home in Peoria, Illinois from the Clerk of the United States Bankruptcy Court for the Central District of Illinois, and that at all

times then and thereafter affiant materially relied upon such Memorandum Order from the Honorable Max J. Lipkin, United States Bankruptcy Judge for the Central District of Illinois, and which Memorandum Order provides in relevant and material part as follows:

"Along with this memorandum you have been mailed your discharge.

2. You are ONLY released from income taxes for those taxable years ending more than three (3) years before the date you filed your Petition in the Court.

6. You ARE released for debts with respect to claims based on alleged false financial statements ..., unless a complaint with respect to such claim was filed in this Court, within the time allowed. If the case is decided

against you, you are NOT discharged for that debt.

7. You ARE also relieved from liability for debts, with respect to claims based on fraud ..., unless a complaint with respect to such a claim was filed in this Court, within the time allowed.

13. Keep this Memorandum where you can refer to it from time to time as the need arises."

Max J. Lipkin
United States
Bankruptcy Judge

FURTHER AFFIANT SAYETH NOT.

THOMAS V. CASSIDY
Affiant.

Subscribed and sword to before me this 27th day of February, 1989.

SEAL

_____ NOTARY PUBLIC

MEMORANDUM

Along with this Memorandum you have been mailed your discharge.

It is my responsibility to advise you as to the effect of your discharge.

1. A "DISCHARGE" means you are released from most, but not all, of the debts which you owed at the time of filing your Petition in this Court.

However, as I have indicated, there are certain debts from which you are not released.

2. You are ONLY released from income taxes for those taxable years ending more than 3 years before the date you filed your Petition in this Court.

3. You are NOT released from property taxes on real estate which you still own. You ARE released from such taxes on real estate you no longer own,

if the taxes were assessed before you filed your Petition and said taxes were payable, without penalty, one year or more before the date of filing your Petition.

4. You are NOT released from any debt to any governmental or nonprofit institution of higher learning, for an educational loan, if the repayment became due within 5 years of the filing of your Petition.

5. You are NOT released from liability of (1) debts not listed, or (2) amounts due for alimony or child support, or (3) from fines and penalties.

6. You ARE released from debts with respect to claims based on alleged false financial statements and willful and malicious injury caused to another

person, or his property, unless a complaint with respect to such claim was filed in this Court, within the time allowed. If the case is decided against you, you are NOT discharged for that debt.

7. You ARE also relieved from liability for debts with respect to claims base don fraud, embezzlement, or larceny, unless a complaint with respect to such claim was filed in this Court, within the time allowed. If the case is decided against you, you are NOT discharged from that debt.

This does NOT relieve you of any criminal liability in connection with these matters.

8. If you have entered into a security agreement with respect to, or given a mortgage on any property,

either personal or real, you are released from the debt, but your property is not released from the lien, and the creditor is entitled to the return of the property.

9. Your discharge does not release a co-debtor or co-signer of liability for the debt.

10. If property has been retained by you because it is exempt, it may not be exempt with respect to debts incurred after your discharge. As to such debts, the Exemption Laws of Illinois, at the time, or any other state where you may reside, at the time, will apply.

11. If you are sued on any debt discharged in your case you must appear and defend yourself, otherwise a judgment will be entered against you.

See your lawyer, or see a lawyer, make sure that the judge in that case is advised that the debt has been discharged.

If you neglect taking this action and a judgment is entered against you, it will be very expensive to have the judgment set aside.

12. If a creditor or collection agency attempts to collect a debt which has been discharged be sure to remind them of the Bankruptcy. DO NOT make any payments to them. It is advisable to notify them in writing, keeping a copy of the letter.

13. Keep this Memorandum where you can refer to it from time to time as the need arises.

_____
U.S. BANKRUPTCY JUDGE

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 30, 1989.

Before

Hon. WILLIAM J. BAUER, Chief Judge

IN THE MATTER OF:

THOMAS V. CASSIDY,
Debtor-Appellant

NO. 89-1121 vs.

COMMISSIONER OF I.R.S.
Appellee-Plaintiff

Appeal from the United States District Court for the Central District of Illinois, Peoria Division No. 88 C 1108 Judge Michael M. Mihm

This matter comes before the court for its consideration of the "MOTION TO FILE SUPPLEMENT TO APPELLANT'S BRIEF AND SUPPLEMENT TO APPELLANT'S APPENDIX

TO BRIEF" filed herein on March 13, 1989.

On consideration thereof,

IT IS ORDERED that the unopposed motion is GRANTED. The clerk of this court is directed to return appellant's brief in order for the corrections noted in this motion to be made. The corrected briefs must be returned to the clerk of this court by April 10, 1989.

Thomas V. Cassidy
2648 Sharondale Circle N.E.
Atlanta, GA 30305
89-1121

Thomas V. Cassidy
Attorney At Law
Illinois licensed
United States Federal Courts
2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
(404) 237-0494

September 20, 1989

Clerk Thomas F. Strubbe
United States Court of Appeals
Clerk of the Court
Room 2722, Dirksen Federal Bldg.
219 South Dearborn Street
Chicago, Illinois 60604

RE: Appellant's Supplemental Citations.
THOMAS V. CASSIDY
Debtor - Appellant
No. 89-1121

Dear Mr. Strubbe:

Pursuant to Federal Rule of Appellate Procedure 28(j) and Seventh Circuit Court of Appeals Rule 28(i) I herewith enclose for filing and the attention of the Court original and ten [10] copies of Appellant's Citation of Supplemental Authorities with attached exhibits, together with Certificate of Service of same upon all attorneys of record herein. Thank you.

SUPPLEMENTAL CITATIONS OF APPELLANT

AUTHORITY CITED "A"

Roberts v. Internal Revenue Service, 94 B.R.707. Bky. No. 88-01681-C, Adv. No. 88-0188-C, U.S. Dist. Ct., Northern District of Oklahoma [Opinion filed: June 26, 1989], 887 F.2d 1541 (1989).

PRESCRIPT OF CASE HOLDING

AND REASON AND PROPOSITION

THE AUTHORITY SUPPORTS

Pursuant to 11 U.S.C. 523(a)(7)(B), as read with 11 U.S.C., sec. 507(a)(7)(A)(i), penalties on taxes in the Roberts case and this instant case all of which were over three (3) years old at the time the petition for relief was filed are dischargeable and discharged.

REFERENCE TO THE PAGE OF APPELLANT'S BRIEF AND/OR APPELLANTS REPLY BRIEF TO WHICH THE CITATION PERTAINS

1. Appellant's Brief pages(s): 19 and 20.

2. Appellant's Reply Brief page(s): 5, 6, 7 and 8.

3. Appellant's Appendix to Brief .page(s): 16.

FOOTNOTE: As of the date of Appellant's supplemental citations this case has not been reported in the official

federal reports nor assigned a citation. The opinion is therefore attached in its entirety as EXHIBIT "A".

AUTHORITY CITED "B"

Blanchard v. Bergeron, 109 S.Ct. 939 (Decided Feb. 21, 1989); (Justice Scalia's concurring opinion pages 946 and 947.)

PRESCRIPT OF CASE HOLDING
AND REASON AND PROPOSITION
THE AUTHORITY SUPPORTS

Adversary arguments of "legislative intent" and "legislative history" to support a proposition of law advanced by a proponent will no longer be countenanced or "participate in (the judicial) process" by the United States Supreme Court or the various Federal Circuit Court of Appeals Courts.

(Concurring opinion of Justice Scalia. Blanchard v. Bergeron, supra.)

REFERENCE TO THE PAGE OF APPELLANT'S BRIEF AND/OR APPELLANT'S REPLY BRIEF TO WHICH THE CITATION PERTAINS

1. Appellant's Brief page(s): 19 and 20.

2. Appellant's Reply Brief page(s): 7 and 8.

FOOTNOTE: The opinion in its entirety is here attached as Exhibit "B".

AUTHORITY CITED "C"

I.R.M. (Commissioner of Internal Revenue Manual) 57(13) 3.7; The Treatment of Federal Tax Claims in Bankruptcy, James I. Shepard, J.D., LL.M.: "Seminar Materials For Northwestern Workshop For United States Bankruptcy Judges", San Francisco, California - - February 22, 1989.

PRESCRIPT OF CITATION HOLDING AND REASON AND PROPOSITION THE AUTHORITY SUPPORTS

"The bankruptcy court has jurisdiction to adjudicate the merits of any claim made in a proceeding conducted under the jurisdiction of the court, and the court has concurrent jurisdiction with the Tax Court, covering any liabilities which <u>were pending before the Tax Court at the commencement of the proceeding in which the federal taxes are claimed,</u> and an adjudication by the bankruptcy court relative to federal taxes is binding on the United States, and the bankruptcy court's determination on the merits of the tax liability as to the amount of the taxes disallowed by the bankruptcy court must be abated."

REFERENCE TO THE PAGE OF APPELLANT'S BRIEF AND/OR APPELLANT'S REPLY BRIEF TO WHICH THE CITATION PERTAINS

1. Appellant's Brief page(s): 20, 21, 23, 24 and 25.

2. Appellant's Reply Brief pages(s): 1 and 2.

3. Supplement to Appellant's Appendix To Brief: 5(a), 5(b), 5(c) and 5(d).

4. Appellant's Appendix To Brief: 5, 45 and 46.

FOOTNOTE: The "Internal Revenue Manual" (I.R.M.) is prepared by the Commissioner of Internal Revenue with the aid and assistance of legal counsel and is distributed to the Service as an official guide and source.

AUTHORITY CITED "D"

Empire Fire and Marine Insurance Co. v. J. Transport, Inc., Case No. 88-

8434, U.S. Eleventh Circuit Court of Appeals. (Opinion filed: August 21, 1989.)

~

PRESCRIPT OF CASE HOLDING AND REASON AND PROPOSITION THE AUTHORITY SUPPORTS

Res judicata, collateral estoppel or "issue preclusion" only bars claims actually litigated and the issue of fraud in the instant case was not actually litigated.

REFERENCE TO THE PAGE OF APPELLANT'S BRIEF AND/OR APPELLANTS REPLY BRIEF TO WHICH THE CITATION PERTAINS

1. Appellant's Brief page(s): 7, 9, 11, 13, 14, and 16.

2. Appellant's Reply Brief page(s): 2, 3, 4 and 5.

FOOTNOTE: As of the date of Appellant's supplemental citations this

case has not been reported int he official federal reports nor assigned a citation. The opinion is therefore attached in its entirety as EXHIBIT "D".

AUTHORITY CITED "E"

RESTATEMENT (SECOND) OF JUDGMENTS, sec. 27 (1982).

PRESCRIPT OF CITATION

AND REASON AND

PROPOSITION THE AUTHORITY SUPPORTS

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

REFERENCE TO THE PAGE OF APPELLANT'S

BRIEF AND/OR APPELLANT'S REPLY BRIEF TO WHICH THE CITATION PERTAINS

1. Appellant's Brief page(s): 7, 9, 11, 13, 14 and 16.

2. Appellant's Reply Brief page(s): 2, 3, 4 and 5.

FOOTNOTE: The Restatement (Second) of Judgment was adopted by the American Law Institute (ALI) in 1980. It is the product of ten years effort by Reporters Benjamine Kaplan (till 1973), David L. Shapiro (till 1974), and Geoffrey C. Hazard, Jr. (since 1973), and their advisors. It supercedes the original Restatement of Judgments promulgated by the ALI in 1942 with Austin W. Scott and Warren A. Seavey as Reporters, assisted by Erwin N. Griswold. Wechsler, FORWARD TO RESTATEMENT (SECOND) OF JUDGMENTS at

vii (1982). A collection of articles analyzing the new Restatement can be found in Symposium on the Restatement (Second) of Judgments, 66 CORNELL L. REV. 401 (1981). The factual issue of fraud was not litigated in the instate case and it was essential to the final judgment of the Tax Court.

Respectfully submitted:

THOMAS V. CASSIDY,

Appellant-Debtor, pro se

and co-counsel.

CERTIFICATE OF SERVICE

THOMAS V. CASSIDY, an attorney at law, hereby certifies that he has caused true and correct requisite copies of the foregoing together with attached exhibits to be served upon all attorneys of record herein at their published business addressed vis United States Postal Mail Service, postage prepaid in a properly addressed envelope from Atlanta, Georgia this 20th day of September, 1989.

THOMAS V. CASSIDY,

so certifies.

Service Copies to:

Mr. Timothy J. Cassidy

Attorney at Law

Cassidy & Mueller, Attys.

1510 Savings Center Tower

Peoria, Illinois 61602

Mssrs. Gary R. Allen,

Gary D. Gray, Howard M. Soloman

Attorneys -- Tax Division

Department of Justice

Post Office Box 502

Washington, D.C. 20044

Thomas V. Cassidy
Attorney At Law
Illinois licensed
United States Federal Courts
2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
(404) 237-0494

December, 08 1989

Clerk Thomas F. Strubbe
United States Court of Appeals
Clerk of the Court
Room 2722, Dirksen Federal Bldg.
219 South Dearborn Street
Chicago, Illinois 60604

RE: Appellant's Supplemental Citations.
THOMAS V. CASSIDY
Debtor - Appellant
No. 89-1121

Dear Mr. Strubbe:

Pursuant to Federal Rule of Appellate Procedure 28(j) and Seventh Circuit Court of Appeals Rule 28(i) Appellant herewith makes by this letter to you -- original and ten (10) copies -- his second Supplemental Citation for filing and the attention of the Court together

with Certificate of Service of same upon all attorneys of record herein, the following cited authority for Appellant, with reference to Appellant's Brief, Reply Brief and Appendix to Brief pages, as well as Appellant's Supplemental Citations Title dated September 20, 1989 where the case authority is relevant and supportive, to wit:

Burns v. United States [for the IRS], 887 F.2d 1541 (11th Circuit Court of Appeals, November 13, 1989).*

REFERENCE TO THE PAGES OF APPELLANT'S BRIEF, APPELLANTS REPLY BRIEF, APPELLANT'S APPENDIX TO BRIEF AND APPELLANT'S SUPPLEMENTAL CITATIONS' TITLE TO WHICH THE CITATION PERTAINS

1. Appellant's Brief page(s): 19 and 20.

2. Appellant's Reply Brief page(s): 5, 6, 7 and 8.

3. Appellant's Appendix to Brief page(s): 16.

4. Appellant's Supplemental Citations, Title "A".

5. Appellant's Supplemental Citations, Title "B".

Respectfully submitted:

THOMAS V. CASSIDY,
Appellant-Debtor, pro se
and co-counsel.

CERTIFICATE OF SERVICE

THOMAS V. CASSIDY, an attorney at law, hereby certifies that he has caused true and correct requisite copies of the foregoing to be served upon all attorneys of record herein at their published business addressed via United States Postal Mail Service, postage prepaid in a properly addressed envelope from Atlanta, Georgia this 8th day of December, 1989.

THOMAS V. CASSIDY,
so certifies.

Service Copies to:

Mr. Timothy J. Cassidy
Attorney at law
Cassidy & Mueller, Attys.
1510 Savings Center Tower
Peoria, Illinois 61602

Mssrs. Gary R. Allen,
Gary D. Gray, Howard M. Soloman
Attorneys -- Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Footnote to Previous Document

* [Note: Appellee has heretofore supplied your office and the Court with the original and ten (10) copies of the opinion on or about November 27, 1989.)

No. 89-1121

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 89-1121

IN RE: THOMAS V. CASSIDY

Debtor

THOMAS V. CASSIDY,

- Plaintiff-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF

THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEE

JAMES I. K. KNAPP

Acting Assistant Attorney General

Gary R. Allen (202) 633-3361

Gary D. Gray (202) 633-3557

Howard M. Solomon (202) 633-4484

Attorneys

Tax Division

Department of Justice

Post Office Box 502

Washington, D.C. 20044

Of Counsel:

J. William Roberts

United States Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 89-1121

IN RE: THOMAS V. CASSIDY,

Debtor

THOMAS V. CASSIDY,

Plaintiff-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE

Whether the District Court correctly affirmed the Bankruptcy Court's finding that the debtor was precluded from bringing this action in bankruptcy court to determine whether his tax

liabilities and additions to tax for fraud were dischargeable since this Court had previously ruled that the liabilities were nondischargeable in Cassidy v. Commissioner, 814 F.2d 477 (7th Cir. 1987).

. . .tax liabilities had been discharged in bankruptcy. (Ibid) 4/ Following a hearing, the Tax Court granted the Commissioner's motion for summary judgment. (Cassidy I at 480.) The court found that the deemed admissions fully supported the deficiencies determined by the Commissioner, and that the admitted facts were sufficient to meet the Commissioner's burden in proving that the additions to tax for fraud should be imposed. (Ibid.) The court summarily denied the debtor's motion for summary judgment based on the contention that his tax liabilities were discharged in bankruptcy. (A. 12 at n.3.) According to the court, the debtor's contention was "on its face inconsistent with the explanatory

memorandum attached to [the debtor's] Discharge of Debtor order and the April 13, 1984 order issued by the same bankruptcy judge lifting the automatic stay to permit this case to go forward in the Tax Court." (Ibid.) The court went on to note that, in any event, "the redetermination of an income tax deficiency has 'nothing to do with collection of the tax nor any similarity to an action for collection of a debt * * *'." (Ibid. (citations omitted).)

The debtor appealed the Tax Court's decision, and this Court affirmed. In so doing, this Court first rejected the debtor's argument on appeal that the tax liabilities and additions to tax for fraud had been discharged in the bankruptcy proceeding. (Cassidy I at

480-481.) Specifically, this Court noted that "[b]because the taxpayer's deficiencies here resulted from fraud, subsection 523(a)(1)(C) [of the Bankruptcy Code (11 U.S.C.)] renders them nondischargeable." (A. 22; Cassidy I at 480.) 5/ This Court went on to find that, since the underlying taxes were nondischargeable, the additions to tax for fraud were also nondischargeable. (A. 23; Cassidy I at 481, citing Bankruptcy Code Section 523(a)(7)(A). 6/) This Court therefore concluded that the debtor's argument that the deficiencies and additions to tax were discharged was "without merit." (Ibid.)

Nonetheless, about eight months after this Court decided that the debtor's tax liability and additions to tax were

nondischargeable, the debtor filed with the bankruptcy court a complaint to determine the dischargeability of his liability for the taxes and additions to tax. (A. 2.) The Government filed a motion to dismiss the debtor's complaint on the ground that it was barred by the doctrine of res judicata since this Court had found that the taxes were nondischargeable. (A. 7-8.) The Bankruptcy Court granted the Government's motion on February 2, 1988 (A. 25), and on February 16, 1988, the debtor appealed to the District Court. (See A. 42: Docket entries.) After the parties filed briefs in the District Court, the court entered its order affirming the Bankruptcy Court's dismissal order. 7/ (A. 28-41.) This appeal followed.

SUMMARY OF ARGUMENT

The debtor filed this proceeding in the United States Bankruptcy Court to have that court determine whether taxes and additions to tax owed by him for 1974 and 1975 were dischargeable . . .collateral estoppel have not been met, it should be pointed out that there is no merit to his argument. Indeed, there should be no question that the issue of fraud (upon which the legal conclusion of nondischargeability is premised) was actually litigated in the Tax Court proceeding and essential to the Tax Court's holding. The debtor cannot now complain that it was not more fully litigated because certain findings of fact were entered against him as a result of his failure to comply with discovery rules.

There is, moreover, no merit to his unsupported contention that it remains to be determined what part of the deficiency is attributable to fraud. As the discharge provision of the Bankruptcy Code makes clear, if a debtor has made a fraudulent return, any tax (or additions to tax) arising out of that return is nondischargeable. Finally, this court's consideration of fraud issues was ultimately determined by a valid and final judgment. The determination of the issue of fraud in this proceeding would have been identical to that in the earlier proceeding. Since the ultimate conclusion that the liabilities are nondischargeable (a conclusion already reached by this Court) follows as a matter of law from the finding of

fraud, the debtor's attempt to obtain a different result in this proceeding was properly dismissed.

On appeal, the debtor also seeks to raise issues concerning the merits of his dischargeability claim. Since this cause of action was dismissed on preclusion grounds, those issues are not properly before this Court. In any event, there is no merit to his contentions. In the first place, this Court ruled in the earlier cause of action that the tax liabilities and additions to tax for fraud were nondischargeable in bankruptcy. That ruling is fully supported by the legislative history of Section 523. Next, the debtor's contention that the Government should be estopped from arguing that a determination concerning

dischargeability is precluded because it did not file a complaint to determine dischargeability prior to discharge is absurd. Section 523(c) is clear that "taxing authorities" are not required to file such proceedings in order to preserve that claim against the debtor. Moreover, if the debtor wanted the issue addressed specifically, he was free to file such a proceeding himself.

The judgment of the District Court is correct and should be affirmed.

B. This proceeding was barred by res judicata

The debtor sought to bring this adversary proceeding in the United States Bankruptcy Court to have the court determine that taxes and additions to tax owed by him for the taxable years 1974 and 1975 were dischargeable in bankruptcy. This Court, however, had ruled in a previous suit that those liabilities were nondischargeable. See Cassidy v. Commissioner, 814 F.2d 477 (1987) (Cassidy I). The Bankruptcy Court therefore granted the Government's motion to dismiss the debtor's claim on res judicata grounds, and that dismissal was affirmed by the District Court. On appeal, the debtor primarily contends that the elements necessary

for the application of the preclusion doctrines have no been met. As we shall demonstrate, the debtor's contention has no merit.

First, in asserting that the claim preclusion doctrine (which the debtor refers to as res judicata) does not apply, the debtor claims that there was no identity of the causes of action in the Tax Court and this action. The debtor correctly points out that in order for claim preclusion to apply, there must be "(1) identity of the thing being sued upon; (2) identity of the cause of action; (3) identity of persons and parties; and (4) identity of capacity of a party to sue or be sued." (Br. 8 citing In re Goodman, 25 B.R. 932, 938 (Bankr. N.D. Ill. 1982).) See also Alexander v. Chicago Park

District, 773 F.2d 850, 853-855 (7th Cir. 1985). The debtor claims, however, that the earlier tax court action was not identical to this action since the action in the tax court was brought to redetermine the Commissioner's determinations of a deficiency in tax and additions to tax while this action was . . .

. . . at the debtor's insistence that this Court considered and resolved the dischargeability issue. Once it was resolved by this Court (based on a determination of fraud by a court with the authority to determine that whether the debtor made fraudulent returns), that issue cannot be relitigated.

D. The debtor's remaining arguments are not properly before this Court, but in any event, are meritless

On this appeal, the debtor also seeks to raise issues involving the merits of his dischargeability claim (Br. 18-25). Those issues, of course, are not properly before this Court since the debtor's complaint was dismissed on preclusion grounds. In any event, there is no merit to his contentions.

In the first place, this Court has expressly rejected the debtor's claims (Br. 18-20) that the additions to tax for fraud were dischargeable "as a matter of law." 9/ To the extent that the debtor relies on Roberts v. IRS, 94 B.R. 707 (Bankr. N.D. Okla. 1989), pending on appeal (D. Okla. No. 89-C-0046-B), that case directly conflicts with this Court's decision. In Roberts, the court found, at the outset, that the taxes themselves were nondischargeable under Section 523(a)(1) of the Bankruptcy Code (11 U.S.C.) since the debtors had failed to file tax returns for the years at issue. The court went on to find, however, that the penalties for fraud were not rendered dischargeable simply because they were computed with

reference to the nondischargeable taxes. According to the court, tax penalties are dischargeable if they. . .

. . . penalty is not computed by reference to a tax liability, the transaction or event giving rise to the penalty occurred during the three-year period ending on the date of the petition.

Thus, the additions to tax for fraud in this case are nondischargeable since the fraud penalty is imposed by Section 6653(b) of the Internal Revenue Code, which is computed by reference to the underpayment of tax for the taxable year involved. And as this Court has previously decided, the taxes to which the penalties involved here relate are nondischargeable since the debtor's returns were fraudulent. This Court correctly held that it therefore follows that the penalties for fraud

are also nondischargeable. The decision in Roberts, relied upon by the debtor here, finds no support in the relevant legislative history, and is plainly wrong.

Nor is there any merit to the debtor's "estoppel" claim. He suggests (Br. 20-25) that the Government should be estopped from arguing either that the tax liabilities in issue are nondischargeable or that the Bankruptcy Court is precluded, by prior judicial determination, from considering the dischargeability of those liabilities. He acknowledges (Br. 21) that no statutory provisions "directly mandate" that a taxing authority file a complaint to determine dischargeability of a tax rendered nondischargeable under Section 523(a)(1)(C). But he

argues (ibid.) that "the overall purpose of the Bankruptcy Code and public policy related thereto require the Commissioner to raise the fraud issue before the bankruptcy court prior to discharge * * *." This argument is absurd.

First, no significance can be attributed to the fact that the Government did not file a complaint to determine dischargeability. Only creditors with claims listed in Section 523(a)(2), (4) and (6) are required to file such proceedings. 11 U.S.C. Sec. 523(c). If they fail to do so, their claims will be discharged. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 365 [1978] 5 U.S. Code Cong. & Ad. News 5963, 6321; S. Rep. No. 95-989, supra at 80. The Government's claim for

taxes and penalties falls under Section 523(a)(1) and thus outside the provision requiring creditors to raise questions of dischargeability. Where Congress has specifically provided that creditors with certain classes of claims must initiate proceedings in bankruptcy for an exception to discharge, there is no room to infer, as the debtor does, that creditors with other classes of claims must also initiate such proceedings. Indeed, the logical inference is to the contrary. In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 658 F.2d 1149, 1158 (7th Cir. 1981) (where Congress classified certain employee benefits as an administrative expense under railroad restructuring act, absence of similar statements concerning other

benefits meant they were not entitled to same classification). See also Cash Currency Exchange, Inc. v. Shire, 762 F.2d 542, 552 (7th Cir. 1985).

Moreover, while the debtor attempts to paint the Government as dilatory in this case, the debtor has only himself to blame if he truly wanted a specific determination regarding the dischargeability of the taxes and penalties in issue here prior to the order of discharge. Bankruptcy Rule 4007(a) provides (emphasis added): "A debtor or any creditor may file a complaint with the [bankruptcy] court to obtain a determination of the dischargeability of any debt." Rather than filing such a proceeding at that time, the debtor raised the question of dischargeability before the Tax Court

and, in turn, this Court in Cassidy I. By reopening the bankruptcy case after failing to convince this Court that the liabilities are dischargeable, the debtor seeks to prolong the inevitable.

Finally, the debtor apparently implies (Br. 23-24) that the rulings below frustrate the Bankruptcy Code's purpose of allowing a debtor to "start over and to enhance his chances of financially rehabilitating himself by eliminating old tax debts." The debtor's notion concerning the policies underlying the Bankruptcy Code is far too narrow. As with past bankruptcy laws, the legislative history of the Bankruptcy Code reflects that Congress sought to strike a balance among the competing interests of debtors, private creditors and the Government. See S.

Rep. No. 95-989, at 13-14 ([1978] 5 U.S. Code Cong. & Ad. News at 5799-5800); H.R. Rep. No. 95-595, supra at 274 ([1978] 5 U.S. Code Cong. & Ad. News at 6231). Insofar as the dischargeability issue presented here is concerned, Congress struck the balance in favor of assuring that tax liabilities incurred by reason of fraud survive bankruptcy and remain collectible. The choice among policies was for Congress to make. As the Supreme Court aptly observed in discussing a dischargeability issue under prior law (United States v. Sotelo, 436 U.S. 268, 279-280 (1978)--

Footnotes to Previous Document

4/ The debtor also filed a response to the Commissioner's motion for summary judgment, asserting that he did not timely receive the Commissioner's request for admissions, and that the assessment and collection of the deficiencies were barred by the statute of limitations. (A. 21 Cassidy I at 479.) This Court reviewed the Tax Court's finding that the debtor had received the request for admissions in a timely manner and held that the finding was not clearly erroneous. (A. 23 Cassidy I at 481.)

5/ Section 523(a)(1)(C) of the Bankruptcy Code (11 U.S.C.) provides as follows:

SEC. 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

* * * *

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

6/ Section 523(a)(7) of the Bankruptcy Code (11 U.S.C.) provides as follows:

SEC. 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--

* * * *

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a govenmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

7/ In so doing, the district court determined that dismissal was proper under the doctrine of collateral estoppel, rather than res judicata. (See argument C. infra.)

U.S. Department of Justice
Tax Division

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November 27, 1989

Thomas F. Strubbe, Esquire
Clerk, U.S. Court of Appeals
for the Seventh Circuit
Room 2722, U.S. Courts Building
219 South Dearborn Street
Chicago, Illinois 60604

Re: Thomas V. Cassidy v. Commissioner
(7th Cir. - No. 89-1121)

Dear Mr. Strubbe:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, we wish to invite the Court's attention to the Eleventh Circuit's recent decision in Burns v. United States, 887 F.2d 1541 (1989), which is pertinent to the discussion on pages 19-22 of our brief. We have enclosed ten additional copies of this letter (each with a copy of the Eleventh Circuit's opinion attached

thereto), as required by Rule 28(j) of the Court.

As indicated by the certificate of service, we have forwarded a copy of this letter and the opinion to counsel for the appellant. This case is currently assigned to Howard Soloman of this office, who may be reached at FTS 633-4484.

Sincerely yours,

SHIRLEY D. PETERSON

Assistant Attorney General

Tax Division

By:

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In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1121

IN RE THOMAS V. CASSIDY, Debtor.	)	Appeal from the United States District Court, Central District of Illinois
THOMAS V. CASSIDY, Plaintiff-Appellant, vs. COMMISSIONER OF INTERNAL REVENUE, Defendant-Appellee.	)	

REPLY BRIEF

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FACT CLARIFICATION

In the tax court the DEBTOR responded to the COMMISSIONER'S Motion for Summary Judgment with a Motion to Dismiss and Motion for Summary Judgment alleging, inter alia, that the taxes sought to be assessed were discharged in bankruptcy. At page 5 of the COMMISSIONER'S brief he states that the tax court summarily denied the DEBTOR'S motion for summary judgement. The tax court did not decide the dischargeability issue on its merits. Rather, it refused to consider the issue on the basis that it was beyond the jurisdiction of the tax court. (App. 12). Thomas V. Cassidy v. Commissioner, 51 TCM 784 (9186) at page 786:

"Moreover, the redetermination of an income tax deficiency . . . [by this Tax Court]. . .has 'nothing to do with collection [or dischargeability in bankruptcy] of the tax nor any similarity to an action for collection of a debt . . .' Swanson v. Commissioner [Dec. 33,742] 63 TC 1180, 1184 (1976). Accordingly, if there is any question as to the collectability of any income tax deficiencies . . . that question is beyond the jurisdiction of this Court. Graham v. Commissioner [Dec. 37,400], 75 TC 389, 399 (9180). [Emphasis supplied.]

Further, the DEBTOR'S Notice of Deficiency of Federal Income Taxes for the fiscal years ending August 31, 1974

and August 31, 1975 (App. 20) were discharged, as dischargeable taxes, by the bankruptcy court's order of discharge of March 13, 1984 (App. 5) there having been no determination in the bankruptcy court of actual intent to defraud by the DEBTOR or any finding of fact or conclusion of law to that end.

I.

RES JUDICATA DOES NOT APPLY

The COMMISSIONER relies primarily on the doctrine of res judicata . Res Judicata has no application. The COMMISSIONER argues that the dischargeability "claim" was decided by the tax court, and thus should not be considered by the bankruptcy court. But the tax court never decided any questions of dischargeability since the

issue was beyond its subject matter jurisdiction. The tax court simply decided that it could not decide.

The COMMISSIONER attempts to distinguish In Re Goodman, 25 B.R. 932 (Bkrtcy. N.D.Ill.1982), from the case at bar. The distinguishing facts raised by the COMMISSIONER shows nothing more than a distinction without a difference. Goodman is on point except that the prior proceeding in Goodman addressed the issue of fraud in the California state court instead of the U.S. Tax Court. The COMMISSIONER urges that Goodman does not apply because in Goodman the issue of dischargeability was never decided by the California state court but in this case the tax court and this court on review did consider and decide the

issue. Again, the tax court never decided the question of dischargeability. On review of the tax court decision, this court did consider the question, but such was not essential to affirming the tax court (a necessary element in applying collateral estoppel).

II.

COLLATERAL ESTOPPEL DOES NOT APPLY

The COMMISSIONER argues that the issue of fraud was "actually litigated" in the tax court. It was not. The finding of fraud sufficient to assess civil penalties was based solely on the DEBTOR'S failure to timely respond to a request for admission of facts, although DEBTOR did respond. (App. 17). There was no evidence. There was no defense presented. The fraud issue

was never "actually litigated". It is if a default judgment was taken, which prevents application of collateral estoppel. See In Re Goodman, 25 B.R. 932 (Bkrtcy. N.D.Ill.1982).

The DEBTOR is not questioning the correctness of the tax court decision and this court's decision on review. DEBTOR merely maintains that, notwithstanding the prior proceeding, collateral estoppel does not apply. He is not attempting to "relitigate" the fraud issue. Instead, the fraud issue is sought to be actually litigated in the proper jurisdictional forum (the bankruptcy court) for the first time to determine whether the tax liabilities as determined by the tax court are dischargeable.

Even if the elements of collateral estoppel applied, the special rules that govern the application of collateral estoppel in determining dischargeability in bankruptcy due to jurisdictional restraints precludes its application. In Brown v. Felson, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), the Supreme Court held that res judicata did not apply in a bankruptcy discharge proceeding and that the bankruptcy court is not confined to review the judgment of a prior state court proceeding. The Ninth Circuit in Frank v. Daley, 776 F.2d 834 at 838-839 (9th Cir. 1985) cert. denied. 106 S.Ct. 2279, 476 U.S. 1159, 90 L.Ed2d 721, in considering whether collateral estoppel applied in a bankruptcy discharge proceeding stated:

Even if collateral estoppel technically applied, the special rules that govern the application of collateral estoppel in determining dischargeability in bankruptcy preclude the use of collateral estoppel in the instant case. In In re Houtman, 586 F.2d 651 (9th Cir. 1978), we stated that:

> The 1970 Amendments to the Bankruptcy Act imposed upon the Bankruptcy courts the exclusive jurisdiction to determine dischargeability. As we read those Amendments there is no room for application of the technical doctrine of collateral estoppel in determining the nondischargeability of the debts described in section 17(a)(2),

(4) and (8) of the Bankruptcy Act. This does not mean that the documents which officially enshrine the state court proceedings may not be considered by the bankruptcy judges as establishing the nondischargeability of a debt. What is required is that the bankruptcy court consider all relevant evidence, including the state court proceedings, that is offered by the parties, or requested by the court, and on the basis of that evidence determine the nondischargeability of judgement debts . . . Id. at 634-54 (citations and notes omitted, emphasis added).

In this case now before the court, the bankruptcy court dismissed the DEBTOR'S Complaint to Determine Dischargeability of a Debt as a matter of law based solely on the prior tax court decision and review by this court. The bankruptcy court should consider all relevant evidence, which may include a review of the tax court proceeding. The decision of the bankruptcy court cannot be limited to the proceedings subsequent to DEBTOR'S discharge. To consider all relevant evidence relating to the dischargeability question the bankruptcy court's dismissal of the Complaint to Determine Dischargeability should be reversed and a hearing held on its merits.

III.

THE PENALTIES ARE DISCHARGEABLE AS A MATTER OF LAW

Section 523(a)(7)(B) of the Bankruptcy Code provides that the civil penalties assessed are dischargeable as a matter of law. Clearly this is an issue never considered or decided by the tax court in the prior proceeding. This court discussed the question of discharge under section 523(a)(7)(A), but not section 523(a)(7)(B). (App. 23; Cassidy v. C.I.R., 814 F.2d 477, 481 (7th Cir. 1987).

The COMMISSIONER concedes the legal point that Section 523(a)(7)(B) provides for discharge of the tax penalties at page 20 of COMMISSIONER-appellee's brief:

> And Section 523(a)(7)(B) carves out an exception to the general exception from discharge for tax penalties imposed with respect to an event that occurred more than three (3) years before the petition in bankruptcy was filed. In other words, it is undisputed that a tax penalty imposed with respect to a transaction or event that occurred more than three (3) years before the petition was filed may be dischargeable. (emphasis added.)

The difference between the COMMISSIONER and DEBTOR (and Roberts v. Internal Revenue Service, 94 B.R. 707 (Bkrtcy. N.D. Okla. 1989)) is that the COMMISSIONER insists that section 523(A)(7)(B) must be read in conjunction with and dependant on

section 523(a)(7)(A); if the penalties are not dischargeable under section (A) then they are not dischargeable under subsection (B). This is the precise question considered by the court and rejected in Roberts (supra). Roberts held:

> Just because penalties are not dischargeable under subsection (A) does not mean they cannot be dischargeable under subsection (B). The two subsections operate independent of each other. Roberts, supra (A.19-20).

Neither this court nor the tax court addressed this issue in the prior proceeding, thus precluding application of collateral estopped.

In an effort to illustrate that Roberts was wrongly decided the

COMMISSIONER cites excerpts from the legislative history of section 523(a)(7). Reliance on legislative history is misplaced. First, as Roberts illustrates, the language of the statute is clear and plain, thus precluding any analysis of excerpts from the legislative history to aid in interpretation.

Second, even if use of legislative history were proper, it adds nothing to the plain language of section 523(a)(7)(B). the legislative history cited by the COMMISSIONER suggests that a tax penalty is nondischargeable if the underlying tax is nondischargeable. Here DEBTOR'S underlying tax was dischargeable as an event or transaction that occurred more than three years of the bankruptcy. But the

legislative history is silent as to the three year limitation imposed by section 523(a)(7)(B). Tax penalties imposed as related to transactions or events within three years of the bankruptcy are, as made clear by the statutory scheme, nondischargeable. This is consistent with the legislative history. Tax penalties imposed as related to transactions or events more than three years of the bankruptcy are, as made clear by the statutory scheme, dischargeable. This is also consistent with, or at least not contradicted by, the legislative history since the legislative history is absolutely silent on this point.

DEBTOR'S underlying tax liability was dischargeable and discharged by the bankruptcy court's order of discharge

of March 13, 1984 absent a finding of fact and conclusion of law by the bankruptcy court of DEBTOR'S fraud by actual intent having been proven by the COMMISSIONER in sustaining his burden of proof before the bankruptcy court.

IV.

THE COMMISSIONER BY HIS ACTION AND PRIOR POSITION IN THE BANKRUPTCY COURT HAS ADMITTED DISCHARGEABILITY AND IS JUDICIALLY ESTOPPED AND EQUITABLE ESTOPPED FROM PROCEEDING OTHERWISE

On March 13, 1984, the DEBTOR received a final discharge releasing him from all dischargeable debts. The discharge Order and Final and Permanent Injunction provides in part:

> 3. All creditors whose debts were discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above be and they are hereby enjoined

from commencing, continuing or employing any action; process or act to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor whether or not discharge of such debt is waived. (App.5).

In other words, as to dischargeable debts, creditors were under an injunction enjoining them from proceeding with any acts to collect a debt. As to nondischargeable debts, no injunction was in effect, and in fact had been automatically lifted on March 13, 1984, when the discharge Order was entered. (Section 362(c)(2)(A) provides that the automatic stay continues until the time the case is closed.)

One month after the discharge Order was entered, and on the COMMISSIONER'S petition, the bankruptcy court lifted its permanent injunction "in order to permit the Tax Court proceeding between the parties now pending to proceed forward." (App. 21). The COMMISSIONER'S act of seeking relief from the permanent injunction constitutes a judicial admission that the subject taxes were discharged in bankruptcy since only dischargeable debts were subject to any permanent injunction order after March 13, 1984, and nondischargeable debts were not subject to the March 13, 1984 permanent injunction. If the COMMISSIONER believed and held the position that the taxes were nondischargeable as of March 13, 1984, when the case was closed,

there is no rationale explanation why relief was affirmatively sought from a permanent injunction that applied only to "dischargeable debts".

Additionally, it cannot be said, as urged by the COMMISSIONER, that the lifting of the automatic stay to allow the tax court proceeding to go forward is recognition that the debts were nondischargeable. The opposite is true. The tax court proceeding is merely the redetermination of a tax assessment, and has nothing to do with the collection of a tax. (App. 12). The COMMISSIONER requested, and the bankruptcy court allowed, nothing more than the tax court to determine the amount of a debt. The bankruptcy court never allowed the COMMISSIONER to proceed with a collection of the tax,

and has not, nor has any court, to this day. Any act to collect the tax as determined by the tax court remains subject to the permanent injunction issued by the bankruptcy court on March 13, 1984, which is now a final order. Any act to collect the tax as determined by the tax court would be in willful and knowing and contemptuous violation of the bankruptcy court's Order of permanent injunction of March 13, 1984. It can be presumed the COMMISSIONER would not do that.

The COMMISSIONER by his acts and prior position has clearly acknowledged that any efforts to collect the assessments remain subject to the injunction. If not, why did the COMMISSIONER only request relief from

the injunction so the amount of the debt could be determined?

The doctrine of judicial estoppel prevents a party, here the COMMISSIONER, from asserting a position in a legal proceeding that is contrary to a position previously taken by him in the same or some earlier legal proceeding. If a party, such as the COMMISSIONER, has taken a position before a court, judicial estoppel may be invoked to bar that party, in a later proceeding from contradicting his earlier position. Courts have characterized the purpose of this doctrine variously as "preventing intentional inconsistency," precluding a party from playing "fast and loose with the courts," and prohibiting parties from "deliberately shifting

positions to suit the exigencies of the moment." Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. 1982); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982); Skokomish Indian Tribe v. General Services Administration, 587 F.2d 428, 433 (9th Cir. 1978); Eads Hide & Wool Co. v. Merrill, 252 F.2d 80, 84 (10th Cir. 1958); Scarano v. Central R.R., 203 F.2d 510, 513 (3rd Cir. 1953); IBJ, Moore, J. Lucas & T. Currier, MOORE'S FEDERAL PRACTICE AND PROCEDURE, paragraph 0.405(8) (2d ed. 1984); 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, section 4477 (1981); USLIF Corp. v. United States Life Ins. Co., 560 F.Supp. 1302, 1304 (N.D. Tex 1983); Duplan Corp. v.

Deering Milliken Inc., 397 F.Supp. 1146, 1177 (D.S.C. 1975).

Judicial estoppel prevents inconsistent positions whether or not they have been the subject of a final judgment. Edwards v. Aetna Life Ins. Co., (supra); The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings, 59 Harv. L. Rev. 1132, 133 (1946).

Judicial estoppel deprives a party only of the right to assert a particular position; it limits the position that may be maintained on a particular issue by a party and in this case the COMMISSIONER. The essential distinction is that collateral estoppel prevents the assertion of the same position in order to conserve judicial resources, while judicial estoppel

prevents the assertion of a contradictory position in order to protect the judicial process as a whole. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. 1982); USLIF Corp. v. United States Life Ins. Co., 560 F.Supp. 1302, 1304 (N.D. Tex. 1983); Duplan Corp. v. Deering Milliken Inc., 397 F.Supp. 1146, 1177 (D.S.C. 1975).

These cross jurisdictional but similar observations by a federal court and a state court: Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. 1982): "The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery." and

Department of Transportation v. Coe, 112 Ill App. 3d 506, 510, 445 N.E.2D 506, 508 (1983) "The doctrine of judicial estoppel is an equitable doctrine whose primary purposes are to promote the truth and to prevent parties from deliberately shifting positions to suit exigencies of the moment."

Whether or not the COMMISSIONER'S actions, position and acknowledgment in 1984 "that the taxes were dischargeable" caused the DEBTOR to change his position or materially rely upon the COMMISSIONER'S position "that the taxes were dischargeable" and materially rely upon the Bankruptcy Court's Memorandum Order to Order of Discharge (App. 5c and 5d) is immaterial under the doctrine of

judicial estoppel -- although it is material under the doctrine of equitable estoppel -- the point of fact and law is that the COMMISSIONER is estopped from now claiming the taxes are nondischargeable. Duplan Corp. v. Deering Milliken Inc., 397 F.Supp. 1146, 1177 (D.S.C. 1975); IBJ, Moore, J. Lucas & T. Currier, MOORE'S FEDERAL PRACTICE AND PROCEDURE, paragraph 0.405(8) (2d ed. 1984); See: Estoppel Against Inconsistent Positions In Judicial Proceedings, 9 Brooklyn L. Rev. 245, 247 (1940).

It can be seen, however, in DEBTOR'S affidavit (App. 5a and 5b) which this Court, on this appeal, permitted DEBTOR to file herein by its order of March 30, 1989, that DEBTOR did materially rely upon the COMMISSIONER'S prior

position and that of the Bankruptcy Court's Order of Discharge of March 13, 1984 and its Memorandum Order to Order of Discharge (App. 5c and 5d) "that the taxes were dischargeable" and discharged.

This is an issue never considered by the tax court which prevents the application of collateral estoppel. A hearing on the merits of the Complaint to Determine Dischargeability would allow the issue to be considered, should this Court decide a final judgment in favor of DEBTOR and against COMMISSIONER is not warranted.

V.

IMPLICIT IN THE CONGRESSIONAL INTENT AND MANDATES OF 11 U.S.C. secs. 523 et seq. and 11 U.S.C. secs. 727 (a) and (c)(1) et seq. IS THAT ANY

CREDITOR:

A.

WHOSE CLAIM IN WHOLE OR IN PART ALLEGES FRAUD, OR FALSE REPRESENTATION, OR FALSE PRETENSES IN ORDER TO PRECLUDE DISCHARGEABILITY, HAS AN AFFIRMATIVE OBLIGATION TO TIMELY OBJECT TO DEBTOR'S DISCHARGE AND TO FULLY LITIGATE HIS AFFIRMATIVE AVERMENTS OF FRAUD, IN THE BANKRUPTCY COURT, AND SUSTAIN HIS BURDEN OF PROOF OF THE ACTUAL INTENT OF THE DEBTOR TO DEFRAUD BY THE CLEAR AND CONVINCING EVIDENCE,

B.

AND ESPECIALLY SO WHEN THE CREDITOR IS ORDERED TO DO SO BY AN ORDER OF THE BANKRUPTCY COURT.

A.

The COMMISSIONER advocates in his

brief:

> Next, the DEBTOR'S contention that the Government (COMMISSIONER) should be estopped from arguing that a determination concerning dischargeability is precluded because it did not file a complaint to determine dischargeability prior to discharge is absurd. Section 523(c) is clear that "taxing authorities" are not required to file such proceedings in order to preserve that claim against the DEBTOR. (Aple. Br. 10).

. . . and again COMMISSIONER contends:

> . . . he (DEBTOR) argues that "the overall purpose of the Bankruptcy Code and public policy related thereto require the COMMISSIONER to raise the fraud issue before the

bankruptcy court prior to discharge * * *." This argument is absurd. (Aple. Br. 22).

A lot of absurdity by the DEBTOR and the Seventh Circuit Court of Appeals!!??

This Court did not feel it was absurd.

This Court fully affirms and confirms DEBTOR'S contention under this point of his Reply Brief in its opinion of Matter of Nevear, 674 F.2d 1201, 1205, 1206 (1982) (7th CCA) per Chief Judge Cudahy and J. Fairchild and J. Posner concurring, as follows:

> The issue presented in the instant case is whether section 207 of the Social Security Act, 42 U.S.C. sec. 407 (1976), confers on the SSA (Social Security Administration, a

governmental taxing authority) a blanket exemption from the operation of the Bankruptcy Code, so that an overpayment debt is nondischargeable regardless whether the debt falls within one of the exceptions to discharge listed in section 523.

In support of the SSA's (a governmental taxing authority) interpretation of section 207, the Secretary relies solely on the language of the statute. He offers no reason of policy to explain why congress supposedly gave the SSA rights enjoyed by no other creditor ... 11/

... section 523 (et seq.) of the Code provides that debts arising from

transactions involving "false pretenses, a false representation, or actual fraud," are not dischargeable. 11 U.S.C. sec. 523(a)(2)(A) (Supp. III 1979). While we do not necessarily accept what appears to have been the Secretary's argument in the bankruptcy court -- that the ALJ's (Administrative Law Judge) determination that Nevear was at fault in obtaining the overpayments constitutes a finding of a "false representation" precluding discharge -- we do agree that at least in some cases an overpayment debt might fall within this category of exceptions to discharge. Whether Neaver's debt to SSA (a governmental taxing authority) is such a nondischargeable debt under section 523 (et seq.) is a question

we leave for the bankruptcy court to decide on remand of this cause. 15/

Finally, we pause to note that two recent cases, one now awaiting review in this court, have concluded as we do today that overpayment debts owing to SSA (governmental taxing authority) are dischargeable in bankruptcy. (cases cited.) The reasoning employed in these cases, however, is different from ours. Both cases held that the SSA (governmental taxing authority) had failed to make timely objections under section 523(c) to the discharge of the overpayment debts. (emphasis supplied.)

Just as the Internal Revenue Service and COMMISSIONER is a governmental

taxing authority so too is the Social Security Administration a governmental taxing authority. Any dispute of this contention would not gain the attention and retention of any reasonable minds. If one would dispute this fact he simply has to look at Form 1040, Schedule SE entitled "Social Security Self-Employment Tax", Part 1, Line 8, page 2 (96) which is so designated and compute the Social Security self-employment tax on any of his self-employment earnings in excess of $400.00 by the .1302 multiplier.

If there exists any doubts about this Court's policy toward the promulgation of the United States Bankruptcy Code and especially as it operates towards any creditor making a claim which asserts in whole or in part "actual

fraud", "false representation" or "false pretenses" on the part of the debtor, you all made it very clear in Minnick v. LaFayette Loan & Trust Co., 392 F.2d 973, (1968) (7th CCA) (Per Chief Judge Hastings, J. Schnackkenberg and J. Cummings concurring) at page 977:

> Finally, it is well established that section 14(c) (now section 523(c)) of the Bankruptcy Act, supra, must be liberally construed in favor of the bankrupts and the burden of proof is on the objecting creditor, not the bankrupts. There must be proof of actual intent to defraud such creditor. In Re Schweitzer, supra, 271 F.2d at 97. Appellee, the objecting creditor, has not this case.

The discharges from bankruptcy should issue. These causes are remanded to the district court with directions to grant a discharge in bankruptcy to each appellant. Reversed and remanded. (Emphasis supplied.)

B.

. . . AND ESPECIALLY SO WHEN THE CREDITOR IS ORDERED TO DO SO BY AN ORDER OF THE BANKRUPTCY COURT.

The COMMISSIONER states in his answer brief:

Moreover, while the DEBTOR attempts to paint the Government as dilatory in this case, the debtor has only himself to blame if he truly wanted a specific determination regarding the dischargeability of taxes and penalties in issue prior to the order of discharge. Bankruptcy Rule

4007(a) provides: "A debtor or creditor may file a complaint with the (bankruptcy) court to obtain a determination of the dischargeability of any debt". (Aple. Br. 23, 24).

This statement by the COMMISSIONER begs several issues, facts and authorities. Neither the Rule or the statute (11 U.S.C. sec 727(c)(1).) imposes a time limitation as to either before or after discharge for the filing of a Complaint to Determine Dischargeability by the DEBTOR. In fact that is what the DEBTOR is attempting to do here. Notwithstanding the legal requirements incumbent upon the COMMISSIONER to have filed written objections to the discharge of the debt pursuant of 11 U.S.C. sec. 727(a) and a Complaint to determine dischargeability

of a debt pursuant to 11 U.S.C. sec 523(c) as heretofore discussed by DEBTOR under his prior Points, Authorities and Arguments of his Reply Brief, the COMMISSIONER, additionally, was under a court Order of the bankruptcy court entered December 22, 1983 to file written objections to the DEBTOR'S discharge and a written Complaint to Determine the Dischargeability of the COMMISSIONER'S claim on or before March 12, 1984 or the DEBTOR and the debt would be discharged. (App. 43,44).

The COMMISSIONER knowingly and wilfully violated this court order and did nothing and now attempts to escape the consequences of his conduct and all to the material detriment of the DEBTOR and what, if any, after acquired assets

the DEBTOR now has, and, further, after the DEBTOR materially relied upon the COMMISSIONER not objecting to the rightful discharge of his claim and the bankruptcy court's Order discharging the DEBTOR (App. 5a, 5b); the bankruptcy court's permanent injunction (App. 5), and the bankruptcy court's Memorandum Order to Order of Discharge. (App. 5c, 5d).

This is violative of DEBTOR'S rights and the COMMISSIONER is and should be judicially estopped and equitably estopped from continuing to assert his position, and continuing his actions which are in violation of the United States Bankruptcy Court's final Order and permanent injunction entered March 13, 1984.

CONCLUSION

The plaintiff-appellant-DEBTOR prays that this Court find and enter judgment that the subject tax liabilities and assessments are dischargeable and discharged and/or that the COMMISSIONER remain subject to the March 13, 1984, bankruptcy court's permanent injunction Order enjoining any acts to collect the debt. In the alternative, DEBTOR prays that the order and judgment of the bankruptcy court of February 2, 1988 be reversed and the judgment of the United States District Court, Central District of Illinois entered December 20, 1988 be reversed and the case be remanded for an appropriate trial on the merits.

Respectfully Submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1121

IN THE MATTER OF:

THOMAS V. CASSIDY, Debtor-

Appellant.

Appeal from the United States District

Court for the Central District of

Illinois, Peoria Division.

No. 88 C 1108-Michael M. Mihm, Judge

F.R.A.P. 40

Circuit Rule 40

Petition for Rehearing and

Suggestions for Rehearing in Banc

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In re Burns, 887 F.2d 1541 (1989)

SUMMARY STATEMENT FOR SUGGESTION THAT APPEAL BE REHEARD IN BANC

The Court's opinion invoking on its own motion the doctrine of judicial estoppel is in conflict with a long line of decisions of the United States Supreme Court (See Capron v. Van Norden, 6 U.S. (2 Cranch) 125, 2 L.Ed. 229 (1804); American Fire & Cas. Co. v. Finn, (1951) 341 U.S. 6, 71 S.Ct. 534, 94 L. Ed. 702), and the Court's opinion conflicts with prior decisions of this Court (Eagle Foundation, Inc. v. Dole, 813 F.2d 798 (7 Cir. 1987)), and it, without comparison to other decisions, conflicts with itself.

POINTS WARRANTING RECONSIDERING AND REHEARING BY THIS COURT

I.

A PARTY THAT HAS INVOKED THE JURISDICTION OF A COURT, AND IS UNHAPPY WITH ITS DECISION MAY CHALLENGE ITS JURISDICTION EVEN AFTER JUDGMENT.

II.

ACCEPTING THE COURT'S DECISION THAT CASSIDY HAS TAKEN AN INCONSISTENT POSITION ON AN ISSUE, AND ESTOPPEL APPLIES, HE MUST STILL PREVAIL BASED ON OTHER HOLDINGS IN THE COURT'S OPINION.

III.

JUDICIAL ESTOPPEL CANNOT APPLY BECAUSE CASSIDY HAS NOT TAKEN A POSITION INCONSISTENT WITH THE PRIOR CASE.

IV.

ASSUMING THAT CASSIDY IS PROPERLY JUDICIALLY ESTOPPED FROM RELITIGATING THE FRAUD ISSUE, THIS COURT SHOULD STILL DECIDE THE LEGAL ISSUE OF WHETHER

THE CIVIL FRAUD PENALTIES RELATED TO THE ASSESSED TAX DEFICIENCIES ARE DISCHARGEABLE AS A MATTER OF LAW

FACTUAL BACKGROUND

The Commissioner of Internal Revenue ("Commissioner") sent the Plaintiff-Appellant, Thomas V. Cassidy ("Cassidy"), a notice of deficiency for the fiscal years ending August 31, 1974 and August 31, 1975. (App. p. 20). The Commissioner also determined that some portion of the underpayment was due to fraud and civil fraud penalties were assessed. (App. p. 20). Cassidy filed a petition with the United States Tax Court for redetermination of his income tax liability. (App. p. 11).

A petition for bankruptcy under Chapter 7, 11 U.S.C. Section 701 et seq., was filed against Cassidy on

February 14, 1983. On March 13, 1984, a discharge of all the dischargeable debts was entered by the bankruptcy court. (App. p. 5). After discharge, on April 13, 1984, the bankruptcy court issued an oder lifting the automatic stay to allow the Tax Court proceeding to go forward.

In the Tax Court proceeding the Commissioner sent a Request to Admit under Tax Court Rule 90 (equivalent of Fed. R. Civ. P. 36) and Cassidy did not respond within the 30 days required by the Rule. The matters asserted in the Request were therefore deemed admitted. Among the facts deemed admitted was that "Petitioner [Cassidy] fraudulently and with intent to evade taxes omitted from his income tax returns . . . a substantial portion of his gross

income." The Tax Court found that the deemed admissions of fact in the Request to Admit supported the deficiencies determined by the Commissioner and entered judgment accordingly. (App. p. 18).

Prior to the Tax Court entering judgment, Cassidy filed a motion for dismissal or summary judgment based on his bankruptcy discharge. The Tax Court denied the motion, stating:

> "We summarily denied petitioner's motion because petitioner's contention is on its face inconsistent with the explanatory memorandum attached to petitioner's Discharge of Debtor order and the April 13, 1984 order issued by the same bankruptcy judge lifting the automatic stay to permit this case to

go forward in the Tax Court. Moreover, the redetermination of an income tax deficiency has 'nothing to do with collection of the tax nor any similarity to an action for collection of a debt * * *.' Swanson v. Commissioner, 65 T.C. 1180, 1184 (1976). Accordingly, if there is any question as to the collectibility of any income tax deficiencies, which we doubt, that question is beyond the jurisdiction of this Court. Graham v. Commissioner, 75 T.C. 389, 399 (1980."[1]

(App. p. 12).

Cassidy appealed from the Tax Court to this Court challenging the Tax Court's redetermination of the deficiencies based on the failure to respond to the Request to Admit, and

arguing that the entire debt was discharged in bankruptcy. In Cassidy v. Commissioner, 814 F.2d 477 (7th Cir. 1987) (referred to herein and in this Court's opinion decided January 4, 1990 as Cassidy I), this Court affirmed the judgment of the Tax Court ruling as follows:

> "(1) The tax debt was not dischargeable in bankruptcy; (2) the fraud penalties connected with the taxes were not dischargeable; (3) the finding that Cassidy had over 30 days to answer the Request to Admit was not clearly erroneous; and (4) the facts deemed admitted supported the penalty for fraud."

In the Matter of Cassidy, Docket No. 89-1121, page 3 (decided January 4, 1990).

After this Court's decision in Cassidy 1, Cassidy filed his Complaint to Determine Dischargeability in the bankruptcy court under Bankruptcy Rule 4007. The Commissioner filed a motion to dismiss based on the res judicata affect of Cassidy 1. The bankruptcy court allowed the motion to dismiss. Cassidy appealed to the district court, which affirmed the bankruptcy court's decision based on the doctrine of collateral estoppel instead of res judicata. This appeal followed.

The principle point raised in here on appeal is that the doctrine of collateral estoppel does not apply because the Tax Court had no jurisdiction to consider the dischargeability issue, and thus this Court in Cassidy 1 also had no

jurisdiction to decide the dischargeability issue making any rulings based thereon as dicta.

This Court ruled in this appeal favorably on most of the points raised. It ruled that the Tax Court had no jurisdiction to consider the dischargeability issue and that this Court in Cassidy 1 accordingly had no basis to review any such issue thus making its discussion thereof dicta. Specifically, this Court in the present appeal held as follows:

> "The Court of Appeals exists to review judgments, and consideration of issues outside the scope of any judgment below must necessarily be dicta, as they cannot possibly be grounds either for approval of disapproval of the lower court's

judgment. The Tax Court had no jurisdiction to consider whether Cassidy's tax debt was dischargeable in bankruptcy. Graham v. CIR, 75 T.C. 389 (1980). Bankruptcy cannot therefore have been grounds for either affirmance or reversal of the Tax Court's order, and the Cassidy 1 court's discussion of it cannot have been necessary to its decision. It follows, then, that collateral estoppel and res judicata are technically inapplicable to this case."

In the Matter of Cassidy, Docket No. 89-1121, p. 6 (decided January 4, 1990).

Additionally, this Court noted and recognized that the findings by the Tax Court of fraud were based on Cassidy's

failure to timely respond to a Request to Admit served under Tax Court Rule 90. However, this Court holds in this appeal that the finding of fraud in he prior Tax Court proceeding cannot be used as a basis to collaterally estop the litigation of the discharge issue in the bankruptcy court because Tax Court Rule 90(f) provides that admissions made by a party under that Rule is for the purpose of the pending action only. This Court held as follows:

> "The district court took what appears to be the most reasonable approach to the resolution of this case: the court can rely on the factual findings of the Tax Court that Cassidy acted fraudulently when he filed his returns, which collaterally

estops any contrary contentions. That finding supports the conclusion that the debt was not dischargeable under 11 U.S.C. Section 523(a)(1)(C). This makes sense except for one matter not addressed by the parties or the district court: Tax Court Rule 90(f) states that:

> [a]ny admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

According to the Rule, the admissions from the Tax Court proceeding cannot be used in the bankruptcy proceeding. It follows that the judgment of the Tax Court on that factual issue,

which is based solely on the admissions, cannot be a bar in this proceeding. (Footnote omitted)."

Notwithstanding in the foregoing, this Court affirmed the decision of the district court and the bankruptcy court dismissing Cassidy's Complaint to determine dischargeability relying on the doctrine of judicial estoppel. The issue of judicial estoppel was not raised by either party, was not argued during oral arguments, nor was it even suggested by this Court during oral arguments that it was an issue.

The basis of this Court's use of the doctrine of judicial estoppel can be summarized as follows:

"Nevertheless, we hold that Cassidy is barred from relitigating the

dischargeability of his tax debt. When he appeared before this Court in Cassidy 1, he successfully argued that this Court should address the dischargeability question. Now that he is unhappy with the final result, he has shifted his ground and argues that Cassidy 1 court should have ignored his plea to consider dischargeability."[2]

In the Matter of Cassidy, Docket No. 89-1121, p. 6 (decided January 4, 1990).

ARGUMENT

I.

A PARTY THAT HAS INVOKED THE JURISDICTION OF A COURT, AND IS UNHAPPY WITH ITS DECISION MAY CHALLENGE ITS JURISDICTION EVEN AFTER JUDGMENT

This Court invoked the doctrine of judicial estoppel on the sole basis that it believes that Cassidy urged the Cassidy 1 Court to address and consider the dischargeability issue and now, in this appeal, argues that the Cassidy 1 Court's opinion addressing that issue was not necessary and, therefore, mere dictum. This is the "inconsistency" found sufficient to invoke the doctrine.

It is beyond dispute that the Tax Court in the prior proceeding lacked subject matter jurisdiction to consider whether the tax debt was dischargeable in bankruptcy. The Tax Court recognized its lack of jurisdiction and, this Court in the present appeal also recognizes it. Accordingly, the Tax Court refused to decide the issue

of dischargeability. Nevertheless, this Court in Cassidy 1 did address the issue and said that the tax deficiencies, along with the underlying penalties, were nondischargeable due to the findings of fraud in the Tax Court. The Cassidy 1 Court, as recognized by this Court in the present appeal, had no jurisdiction to consider the dischargeability issue and any discussion concerning it is dicta.

In the field of federal jurisdiction it is well accepted and long established that a party cannot confer jurisdiction on a federal court that it otherwise does not have and that a party who has invoked the jurisdiction of a federal court and is unhappy with its decision may challenge that Court's jurisdiction even after a judgment. In

Glasstech, Inc. v. Ab Kyro Oy, 769 F.2d 1574, at 1577 (Fed. Cir. 1985) the United States Court of Appeals for the Federal Circuit held that:

> "Despite the interests of judicial economy and the benefits to the parties in advancing the litigation, no interest is served by an appellate decision under a jurisdictional cloud. The parties can not confer jurisdiction by mutual consent. And it has long been established that a party is not prevented from subsequently challenging a court's jurisdiction which the party had previously invoked. Capron v. Van Noorden, 6 U.S. (2 Cranch) 125, 2 L.Ed. 229 (1804).

In American Fire & Casualty Co. v. Finn (1951) 341 U.S. 6, at 18, 71 S.Ct. 534,

95 L.Ed. 702 at 710, the United States Supreme Court held that a party who has invoked the jurisdiction of the federal courts and is unhappy with its decision may indeed challenge its jurisdiction even after judgment. Footnote 17 of American Fire & Casualty Co. states in relevant part as follows:

> "It is true . . . as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule and allowed a party to assign for error that which was for his advantage, if it were a

departure by the court itself from its settled course of procedure." American Fire & Casualty Co., supra, 341 U.S. at 18, 9 L.Ed. at 710 (Footnote 17). The "settled course of procedure" that the Court was referring to was its federal jurisdiction.

Cassidy, in this appeal, has raised as an issue whether the Tax Court in the prior proceeding had subject matter jurisdiction to consider the dischargeability issue and, accordingly, whether the Cassidy 1 Court had jurisdiction on review of the Tax Court decision to consider the issue. We think not, and this Court agrees when it holds that the Cassidy 1 discussion concerning dischargeability is mere dicta. Cassidy has a right, as recognized by the United States Supreme

Court, to challenge the propriety of the Cassidy 1 Court's jurisdiction on the dischargeability issue, and he, under that right, cannot be estopped under the doctrine of judicial estoppel from making such a challenge.

II.

EVEN IF CASSIDY HAS TAKEN INCONSISTENT POSITIONS ON AN ISSUE, AND JUDICIAL ESTOPPEL APPLIES, HE MUST STILL PREVAIL BASED ON OTHER HOLDINGS IN THE COURT'S OPINION

This Court's opinion, without comparison to any other decisions of other courts, is internally inconsistent and conflicts with itself.

The basis of this Court's holding that judicial estoppel prevents Cassidy from having a hearing before the proper jurisdictional court (the bankruptcy

court) on the issue of dischargeability is that this Court in Cassidy 1 decided the issue as a result of Cassidy's "plea" This Court finds here that Cassidy has taken an inconsistent position by arguing that any discussion of dischargeability in Cassidy 1 was not necessary to its review of the Tax Court's decision (due to the Tax Court's lack of jurisdiction) and is thus judicially estopped from avoiding the effect of the Cassidy 1 decision. Even if the findings of this Court are correct, and the use of the doctrine of judicial estoppel is proper in this case, it is not sufficient to estop or bar Cassidy from a hearing on his Complaint to determine dischargeability and the decisions of the district court

and bankruptcy court must still be reversed.

In properly analyzing this conclusion the question that must be asked is - what is estopped? The only proposition that can be estopped, if a proper application of judicial estoppel is made, is that position which is found to be "inconsistent". In Eagle Foundation, Inc. v. Dole, 813 F.2d 798 at 810 (7th Cir. 1987) this Court in addressing the limitation of the doctrine of judicial estoppel held that:

> "The foundation invokes the doctrine of judicial estoppel, which precludes the parties from abandoning positions taken in earlier litigation. (Citations omitted). The principle is that if you prevail in suit #1 by

representing that A is true, you are stuck with A in all later litigation growing out of the same events."

The inconsistent positions found by this Court is that in the prior proceeding Cassidy urged this Court to decide the dischargeability issue and now he says that any such discussion concerning dischargeability was improper and mere dictum. Thus, if the doctrine of judicial estoppel is to be properly applied, that which creates the inconsistency is what must be estopped. In other words, since according to this Court, Cassidy prevailed on it to decide the dischargeability issue in Cassidy 1, he is stuck with the decision as its holding and not mere dictum. The most that can be said under the proper

application of judicial estoppel is that Cassidy is now estopped from arguing that the dischargeability discussion in Cassidy 1 is dictum, but rather that Cassidy must accept the fact under judicial estoppel principles it was the holding of the case.

So let us remove the inconsistency and assume (for the sake of argument and illustration) that the holding (as opposed to dicta) in Cassidy 1 is that the taxes and penalties are not dischargeable. Assuming that as the Cassidy 1 holding, it was based and could only be based on the factual finding in the Tax Court that the relevant tax returns were fraudulent as determined by the deemed admissions in the Request to admit. The basis to determine fraud to support the

conclusion of nondischargeability in Cassidy 1 can be no different than the basis for the finding of fraud in the Tax Court; the facts deemed admitted in the Request to Admit. Thus, in removing the perceived inconsistency justifying judicial estoppel, and in then recognizing that the discussion of dischargeability in Cassidy 1 was its holding, that holding is, nevertheless, based on admissions made by a party under Tax Court Rule 90(f).

Rule 90(f) states that:

> [a]ny admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding."

This Court recognizes this proposition and holds in this appeal that "the admissions from the Tax Court proceeding cannot be used in the bankruptcy proceeding." In the Matter of Cassidy, Docket No. 89-1121, p. 4 (decided January 4, 1990). Likewise, this Court's review of the Tax Court proceeding in Cassidy 1, if resulting in holdings based on factual findings arising out of admissions made by Cassidy under Rule 90 in the Tax Court, cannot be used as a bar to the bankruptcy proceeding.

Thus, even if the perceived inconsistency exists, it is nothing more than a red herring. If Cassidy concedes that the inconsistency exists and further consents to its removal by recognizing this Court's discussion of

the dischargeability issue in Cassidy 1 as its holding, he must still prevail because that holding is based upon deemed admissions of fact under Rule 90, and those deemed admissions cannot be used against him in subsequent proceedings. It must be emphasized that the findings and conclusions of this Court in Cassidy 1 were not reached independently of the factual findings in the Tax Court, but rather were based on the factual findings of the Tax Court made through the Request to Admit.

III.

JUDICIAL ESTOPPEL CANNOT APPLY BECAUSE CASSIDY HAS NOT TAKEN A POSITION INCONSISTENT WITH THE PRIOR CASE

The factual premise of this Court's use of judicial estoppel is that

Cassidy has taken an inconsistent position by "arguing" and making a "plea" that the Cassidy 1 Court decide the dischargeability issue. Cassidy concedes that the question of dischargeability was briefed by him in asking the Court to review the Tax Court's denial of Cassidy's motion to dismiss or for summary judgment based on the bankruptcy discharge. However, it was never an issue whether this Court should consider the discharge question, nor was any "argument" or "plea" made in that regard. In fact, it was the Commissioner in Cassidy 1 that vigorously opposed Cassidy's contention that jurisdiction with respects to the discharge issue did not exist in the Tax Court. The Commissioner argued in its brief in

Cassidy 1 that the Tax Court and this Court did have jurisdiction to consider the issue. The Commissioner "argued" and made a "plea" that this Court find the Tax Court to have jurisdiction and that this Court consider the issue of dischargeability. In this regard we attach pages 26 through 28 of the Commissioner's brief in Cassidy 1 (No. 86-2302) wherein it is clear that the Commissioner is urging this Court to recognize the Tax Court as having jurisdiction to determine the dischargeability issue and to have this Court also consider it.

This point is raised at this time because the doctrine of judicial estoppel was never an issue in this case, at least to the knowledge of he parties, until this Court's opinion was

received and read. Cassidy never had the opportunity to brief or argue the factual basis or law concerning judicial estoppel as applied here. This Court in its opinion clearly takes personal issue with Cassidy in accusing him of "whipsawing" and "playing fast and loose" with the Court to accomplish delay. This is simply not the case. After the Tax Court's decision a timely appeal was made to this Court.

After the decision in Cassidy 1, Cassidy immediately filed his Complaint to Determine Dischargeability in the bankruptcy court. This was done because it was the first opportunity to make such a filing after it was made clear in the Tax Court decision that it had no subject matter jurisdiction to consider the dischargeability issue.

It was conclusively determined at that time that the proper jurisdictional forum was the bankruptcy court, to which there is now no dispute. After the bankruptcy court dismissed the Complaint to Determine Dischargeability based upon principles of res judicata or collateral estoppel this appeal was timely made and all due respect was given to this Court at all times. Any improper activity in the Tax Court that occurred by way of procedure or otherwise resulted in an adverse decision to Cassidy. Now, it is improper and without legal basis to look back to the Tax Court proceedings and to penalize a party and deny him a hearing concerning substantial tax debts and penalties in the court with proper jurisdiction. The doctrine of

judicial estoppel is based on the proposition of preventing inconsistencies within the courts. It is not a penal doctrine.

IV.

ASSUMING THAT CASSIDY IS JUDICIALLY ESTOPPED FROM RELITIGATING THE FRAUD ISSUE, THIS COURT SHOULD DECIDE THE LEGAL ISSUE OF WHETHER THE CIVIL FRAUD PENALTIES RELATED TO THE ASSESSED TAX DEFICIENCIES ARE DISCHARGEABLE AS A MATTER OF LAW

Assuming this Court's use of judicial estoppel in this case is proper, it can only extend to barring Cassidy from relitigating the factual issue of fraud in the bankruptcy court. However, before this Court is also the issue of whether the civil fraud penalties assessed are dischargeable as a matter

of law. A factual adjudication or litigation is not necessary to resolve that issue.

This Court in Cassidy 1 held that the civil fraud penalties were not dischargeable under Bankruptcy Code Section 523(a)(7)(A). Although raised as an issue in the Complaint to Determine Dischargeability before the bankruptcy court below, it has never been determined in this appeal or in the prior proceedings whether the fraud penalties, as a matter of law, are dischargeable under Bankruptcy Code Section 523(a)(7)(B). The bankruptcy court in Roberts v. IRS, 94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed an appeal (B. Okla. No. 89-C-46-B) and the United States Court of Appeal for the Eleventh Circuit in In re Burns, 887

F.2d 1541 (1989) have held that the plain language of Bankruptcy Code Section 523(a)(7)(B) provides that tax fraud penalties associated with taxing years which preceded the filing of bankruptcy by more than three years were dischargeable as a matter of law. There is no factual dispute that the tax fraud penalties assessed against Cassidy were assessed more than three years prior to the filing of his bankruptcy petition. Accordingly, and given the lack of any factual dispute, the fraud penalties are dischargeable as a matter of law. However, and notwithstanding the clear mandate from Congress, this Court's holding, based on judicial estoppel, that Cassidy is barred from relitigating the fraud issue, has resulted in him not being

discharged from the tax fraud penalties when no litigation is necessary. Cassidy has never had the opportunity for a hearing on this issue. By this Court refusing to decide, it has in effect held that the tax fraud penalties assessed against Cassidy more than three years prior to the filing of his bankruptcy petition are nondischargeable. This creates a conflict between this circuit and the Eleventh and Tenth Circuit.

If this Court should determine that Cassidy is not entitled to a rehearing or a rehearing in banc on the foregoing matters relating to judicial estoppel, it should consider rehearing the issue concerning the dischargeability of the civil tax fraud penalties.

CONCLUSION

Based on the foregoing, and other matters implicit therein, the Debtor-Appellant, respectfully requests this Court to grant a rehearing and a rehearing *in banc* of its decision of January 4, 1990, and that it reverse the decision of the district court and bankruptcy court.

Respectfully submitted,

TIMOTHY J. CASSIDY
CASSIDY & MUELLER
1510 Savings Center Tower
Peoria, Illinois 61602
309/676-0591
Attorneys for Plaintiff-Appellant.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 86-2302

THOMAS V. CASSIDY,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Tax Court correctly granted summary judgment in favor of the Commissioner with respect to income tax deficiencies and fraud penalties that were established through facts deemed admitted pursuant to Rule 90 of the Rules of Practice and Procedure of

the United States Tax Court (Jan. 1, 1974).

2. Whether taxpayer's income tax deficiencies and fraud penalties were discharged in taxpayer's bankruptcy proceedings.

JURISDICTIONAL SUMMARY

Taxpayer Thomas V. Cassidy appeals from the order and decision of the United States Tax Court (Judge Arthur L. Nims, III) granting summary judgment for the Commissioner.

are governed by Section 727. Section 727(b) incorporates by reference the exceptions to discharge that are set forth in Section 523. "Except as provided in Section 523," a discharge in Chapter 7 generally discharges a debtor from all debts that rose before the commencement of the case. 11 U.S.C. Sec. 727(b).

Second, to the extent taxpayer is attempting a challenge to the Tax Court's exercise of jurisdiction in this case on the theory that the Bankruptcy Court had exclusive jurisdiction over the tax controversy, his argument is plainly wrong. 10/ It is true that the bankruptcy courts are granted jurisdiction in tax matters under Section 505 of the Bankruptcy Code, even if a petition for a

redetermination of a deficiency was pending in the Tax Court at the time the petition in bankruptcy was filed. But it does not follow that the Bankruptcy Court has exclusive jurisdiction over the tax matter. Rather, the legislative history indicates that where a Tax Court proceeding is pending at the time the petition in bankruptcy is filed, "[i]n essence * * * the bankruptcy judge will have authority to determine which court will determine the merits of the tax claim, both as to claims against the estate and claims against the debtor concerning his personal liability for nondischargeable taxes." 124 Cong. Rec. 32,350, 32,414; 124 Cong. Rec. 33,989, 34,014. 11/ The Bankruptcy Court and tax Court had concurrent

jurisdiction. Compare In Re Photo Chrome, Inc., 346 F. Supp. 958, 961 (E.D. N.Y. 1972); Cunningham v. Commissioner, 20 B.T.A. 428, 430 (1930) (Once Tax Court acquired jurisdiction, it did not lose it because of bankruptcy or receiver proceedings)(decided under pre-Code law). Accord Hoffman v. Commissioner, 7 B.T.A. 303, 305 (1927); Plains Buying & Selling Assn. v. Commissioner, 5 B.T.A. 1147, 1153 (1927). Insofar as the record in this case reflects, however, taxpayer never sought to have the Bankruptcy Court decide whether the tax controversy should be brought before it or continued in the Tax Court. Instead, the record reflects that the Government sought relief from the automatic stay, which was granted

by the Bankruptcy Court, so that the Tax Court proceeding could be conducted. (Doc. 17, Ex. A.) In these circumstances, there is no basis for taxpayer's position that the Tax Court lacked jurisdiction to decide the tax controversy. 12/

Insofar as the merits of the dischargeability issue is concerned, there is no substance to taxpayer's insistence that his tax liabilities were discharged because they were incurred more than three years prior to the date he filed his petition in bankruptcy. As taxpayer seems to acknowledge elsewhere in his brief (p. 18), there are a number of exceptions to discharge where taxes and tax penalties are concerned, including an exception where the taxpayer makes a

fraudulent return. Thus, it is of no significance that his tax liabilities do not fall within. . .

Footnotes to Previous Document

[1] This Court agreed and holds that the Tax Court had no jurisdiction to consider whether Cassidy's tax debt was dischargeable in bankruptcy. In the Matter of Cassidy, Docket No. 89-1121 (decided January 4, 1990)

[2] The factual premise of this Court's use of the doctrine of judicial estoppel to deny him a hearing on the issue of dischargeability is wrong. As will be discussed more fully later, Cassidy never "argued" or made a "plea" to have the Cassidy 1 court consider the issue of dischargeability. Whether the Cassidy 1 court should have considered that issue in the first instance was never in dispute. In fact, the Commissioner urged the Cassidy 1 court that the Tax Court had subject matter jurisdiction to determine the dischargeability issue and that this Court also had such jurisdiction and should decide the issue.

RESPECTFULLY SUBMITTED,

Appellant-Petitioner,
Pro Se.
Thomas V. Cassidy
2648 Sharondale Circle, N.E.
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404/237-0494

(3)

No. 89-1734

Supreme Court, U.S.
FILED
JUL 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS V. CASSIDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the court of appeals correctly applied the doctrine of judicial estoppel to bar petitioner from relitigating the dischargeability of his tax liabilities where the court of appeals had previously concluded, after petitioner put the issue before the court, that those liabilities were nondischargeable.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1734

THOMAS V. CASSIDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 892 F.2d 637. The order of the district court (Pet. App. 27-56) and the order of bankruptcy court (App., *infra*, 1a-2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1990. A petition for rehearing was denied on February 5, 1990. The petition for a writ of certiorari was filed on May 7, 1990 (Monday).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. On June 24, 1980, the Commissioner of Internal Revenue issued to petitioner a notice of deficiency in federal income taxes for the fiscal years ended August 31, 1974, and August 31, 1975, based on the inclusion of unreported income and the disallowance of various deductions. Since the Commissioner determined that all or part of the underpayment of tax was due to fraud, he asserted against petitioner additions to tax for fraud pursuant to 26 U.S.C. 6653(b). Petitioner filed a petition in the Tax Court seeking a redetermination of the deficiencies and additions to tax. Pet. App. 85-86.

On February 14, 1983, while the Tax Court case was pending, an involuntary petition in bankruptcy was filed against petitioner under Chapter 7 of the Bankruptcy Code (11 U.S.C.) in the United States Bankruptcy Court for the Central District of Illinois. On January 3, 1984, petitioner notified the Tax Court of that bankruptcy proceeding, and the Tax Court stayed its proceedings in accordance with the "automatic stay" requirement of 11 U.S.C. 362(a)(8). On March 13, 1984, petitioner received a discharge from the bankruptcy court, releasing him from all dischargeable debts. One month later, on the government's petition, the bankruptcy court lifted its stay to allow the Tax Court case to proceed. Pet. App. 87-88.

The Commissioner then mailed to petitioner a request for admissions, together with other discovery documents, pursuant to Rule 90 of the Rules of Practice and Procedure of the United States Tax Court (Jan. 16, 1984). When petitioner failed to respond

to the request for admissions within the 30-day period provided by Tax Court Rule 90, the Commissioner moved for summary judgment.[1] The Tax Court held that the matters set forth in the request for admissions were deemed admitted, and it then gave petitioner an opportunity to respond to the Commissioner's motion. As part of his response, petitioner filed a motion to dismiss with prejudice and a motion for summary judgment in which he asserted that the tax liabilities had been discharged in bankruptcy. Pet. App. 89-91.

Following a hearing, the Tax Court granted the Commissioner's motion for summary judgment. 51 T.C.M. (CCH) 784 (1986); see also Pet. App. 81-83; *id.* at 93-95. The court found that the request for admissions had been mailed on June 12, 1984, and that the matters contained in the request should be deemed to be admitted because petitioner had failed to respond to them within 30 days. The court held that the deemed admissions fully supported the deficiencies determined by the Commissioner, and that the admitted facts were sufficient to meet the Commissioner's burden in proving that the additions to tax for fraud should be imposed.

The Tax Court also summarily denied petitioner's motion for summary judgment, which had been based on the contention that his tax liabilities were discharged in bankruptcy. The court observed that the case before it was for redetermination of income tax deficiencies, not for review of collection matters. It explained that "if there is any question as to the collectibility of any income tax deficiencies, which we

---

[1] Petitioner had previously ignored other informal and formal discovery requests made by the Commissioner. Pet. App. 87.

doubt, that question is beyond the jurisdiction of this Court." 51 T.C.M. at 786 n.3; see Pet. App. 4-5.

Petitioner appealed, renewing his contention that the tax liabilities had been discharged in bankruptcy, and the court of appeals affirmed. 814 F.2d 477 (*Cassidy I*) (Pet. App. 84-106). The court specifically noted and rejected petitioner's argument that the tax liabilities and additions to tax for fraud had been discharged (Pet. App. 96-98). The court stated that petitioner "first argues that his tax liabilities and fraud penalties were discharged in the chapter 7 bankruptcy proceeding" (*id.* at 96). The court explained that Section 523 of the Bankruptcy Code excepts certain debts from discharge and held that because petitioner's "deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders them nondischargeable" (Pet. App. 97). The court of appeals further stated that, since the underlying taxes were nondischargeable, the additions to tax for fraud "are similarly nondischargeable," pursuant to 11 U.S.C. 523(a)(7)(A) (Pet. App. 98). Petitioner did not seek further review.

2. About eight months after the Seventh Circuit decided in *Cassidy I* that the tax liability and additions to tax were nondischargeable, petitioner filed with the United States Bankruptcy Court for the Central District of Illinois a complaint to determine the dischargeability of his liability for the same taxes and additions to tax. The government moved to dismiss the complaint on res judicata grounds. The bankruptcy court granted the government's motion (App., *infra*, 1a-2a), and petitioner appealed to the district court. The district court affirmed (Pet. App. 27-56), finding that petitioner's complaint was barred by principles of collateral estoppel, rather than res judicata (see *id.* at 28, 36).

The court of appeals affirmed (*Cassidy II*) (Pet. App. 1-24). The court ruled that the doctrines of collateral estoppel and res judicata were "technically inapplicable" because the Tax Court in *Cassidy I* did not have jurisdiction to determine the dischargeability of the liability. Accordingly, the court of appeals found that its own decision in *Cassidy I* was not entitled to res judicata or collateral estoppel effect on this point because the portion of the opinion addressed to dischargeability was dictum that was unnecessary to affirming the Tax Court's judgment. Pet. App. 9-12. Moreover, the court of appeals observed, under Tax Court Rule 90(f) deemed admissions in a Tax Court proceeding may not be used in a bankruptcy proceeding (see Pet. App. 9), and therefore the Tax Court's finding of fraud in *Cassidy I* was not entitled to preclusive effect in the bankruptcy court.

The court of appeals held, however, that the doctrine of judicial estoppel barred petitioner from relitigating the dischargeability issue (Pet. App. 12-21). The court stated that this doctrine is "intended to prevent the perversion of the judicial process" by forbidding a litigant from taking inconsistent positions whenever it suits his interest at the time (*id.* at 13). The court explained that petitioner was now seeking to advance a position diametrically opposite to the one that he successfully urged upon the court of appeals on the prior appeal, and that he is estopped from doing so (*id.* at 16-17):

> [Petitioner] unequivocally urged the *Cassidy I* court to consider the defense of discharge. His present position is that it was error for the court to give him what he wanted. Even though [petitioner] did not prevail on appeal as a whole, he

> did prevail on the subsidiary question of what issues were to be decided by the court. * * * [Petitioner's] maneuverings were clearly intended to delay the inevitable day of reckoning, and in maneuvering he is trying to whipsaw this court. That is exactly the evil that the doctrine of judicial estoppel was meant to avoid.

The court concluded that "[i]t would be unjust to require the Commissioner to relitigate a question that was originally raised by [petitioner] himself, or to allow [petitioner] a second full-scale adjudication of an issue that the court has already resolved against him" (Pet. App. 21).

ARGUMENT

The court of appeals correctly held that, in light of his representations in the prior appeal, petitioner was estopped from relitigating here the court's conclusion on the prior appeal that petitioner's additions to tax for fraud were not discharged in bankruptcy. This holding turns on the facts of this case and does not conflict with any decision of this Court or of another court of appeals. Accordingly, there is no reason for further review.

1. As the court of appeals explained (Pet. App. 13), the doctrine of judicial estoppel is intended to prevent a party from perverting the judicial process by taking inconsistent positions. See, *e.g.*, *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982); *Scarano* v. *Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953). This Court long ago observed that, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

Davis v. *Wakelee*, 156 U.S. 680, 689 (1895). That principle was correctly applied by the court of appeals to bar petitioner's effort to relitigate the question of dischargeability of the fraud penalties.

Petitioner clearly has taken inconsistent positions in the course of his continuing efforts to have the courts declare that his bankruptcy discharged any liability for fraud penalties. In *Cassidy I*, petitioner urged before both the Tax Court and the court of appeals that fraud penalties should not be imposed because they had been discharged in bankruptcy. In accordance with petitioner's submission that the question of dischargeability should be resolved on appeal from the Tax Court, the Seventh Circuit rejected petitioner's position on the merits, ruling that Section 523(a)(7) of the Bankruptcy Code exempted the fraud penalties from discharge. Now, in *Cassidy II*, petitioner takes precisely the opposite position regarding the proper scope of the Tax Court proceeding. Contradicting his prior assertion that the question of dischargeability was properly raised in the Tax Court, petitioner argues that the question was not before the Tax Court and therefore that the Seventh Circuit's rejection in *Cassidy I* of his claim on the merits should be disregarded as dictum. The court of appeals correctly held that petitioner is estopped from making this argument. Having argued to the Seventh Circuit in *Cassidy I* that it was required to rule on dischargeability, thereby inducing the court to address the merits of that issue, petitioner is not free on a second appeal to contradict that argument now that he is dissatisfied with the court's resolution on the merits. As the court of appeals stated below (Pet. App. 17), this is an effort "to whipsaw this

court [, which] * * * is exactly the evil that the doctrine of judicial estopped was meant to avoid." [2]

Contrary to petitioner's contention (Pet. 51), the decision below is fully consistent with this Court's decision in *Brown* v. *Felson*, 442 U.S. 127 (1979). In that case, a debtor filed for bankruptcy after stipulating in a state court collection suit that a creditor was entitled to judgment on a particular claim. In the subsequent bankruptcy proceeding, the creditor asserted that the liability was nondischargeable under pre-Bankruptcy Code law (11 U.S.C. 35(a)(2) and (4) (1976)) because the liability arose from fraud or obtaining money under false pretenses. The debtor objected that res judicata principles barred the creditor from asserting fraud because the stipulated judgment that concluded the state court action made no reference to fraud. This Court disagreed, holding that the creditor could introduce evidence in the bankruptcy court to support his contention of fraud, in response to the new defense of bankruptcy interposed by the debtor. The Court explained that the debtor

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[2] Petitioner devotes the bulk of his submission to arguing the merits of the dischargeability issue, which was not reached by the court of appeals below. See Pet. 40-49. Thus, petitioner correctly notes that the Eleventh Circuit held in *Burns* v. *United States*, 887 F.2d 1541 (1989), that additions to tax for fraud may be dischargeable under 11 U.S.C. 523(a)(7), even though the underlying tax liabilities are not. While the *Burns* decision is at odds with the conclusion of the Seventh Circuit on this point in *Cassidy I*, this case presents no occasion for this Court to resolve the disagreement between those two courts. The decision in *Cassidy I* is not before the Court on this petition; the decision of the court of appeals below did not address the merits of the dischargeability issue, but rather held—correctly—only that petitioner is estopped from relitigating that issue after he sought and obtained a ruling on it in *Cassidy I*.

had "upset the repose that would justify treating the prior state-court proceeding as final, and it would hardly promote confidence in judgments to prevent [the creditor] from meeting [the debtor's] new initiative." 442 U.S. at 133-134.

That decision lends no support to petitioner. In contrast to the creditor in *Brown*, petitioner here is not merely seeking an opportunity to "actually litigate" (see Pet. 51) for the first time an issue that previously had not assumed any importance; rather, he is seeking an opportunity to litigate for the second time an issue that he had already persuaded the court of appeals to decide on a previous occasion. Nothing in this Court's decision in *Brown* suggests that a court must allow a dissatisfied litigant to contradict his prior position concerning the court's jurisdiction to rule on an issue in order to give that litigant an opportunity to relitigate the court's initial ruling.[3]

---

[3] Petitioner appears to suggest (Pet. 52-53) that all of his tax debts were discharged because the IRS did not file a request to determine dischargeability or object to the bankruptcy court's discharge order. This suggestion is entirely without merit. The Bankruptcy Code provides that a discharge order discharges the debtor of all pre-bankruptcy liabilities, except as provided in Section 523. See 11 U.S.C. 727(b). Except in limited circumstances not applicable here (see 11 U.S.C. 523(c); Bankr. R. 4007), a creditor is not required to obtain a bankruptcy court determination that its claim falls within the exceptions under Section 523. Thus, there was no need for the IRS to seek to litigate in the bankruptcy court the question whether its tax debts were excepted from discharge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
GARY D. GRAY
HOWARD M. SOLOMAN
Attorneys

JULY 1990

APPENDIX

UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

Case No. 183-00222

Adversary No. 87-8250

IN RE THOMAS V. CASSIDY, DEBTOR

THOMAS V. CASSIDY, PLAINTIFF,

v.

COMMISSIONER OF INTERNAL REVENUE, DEFENDANT.

ORDER

The debtor, having filed a Complaint to Determine Dischargeability of a Debt;

The defendant, United States of America, on behalf of its agency, the Internal Revenue Service, having filed a Motion to Dismiss Complaint to Determine Dischargeability of a Debt;

The Court, having provided notice to creditors and other parties in interest of a hearing in said cause on January 25, 1988, with regard to defendant's Motion to Dismiss;

The defendant, United States of America, on behalf of its agency, the Internal Revenue Service, having filed a Motion to Tax Costs, at said hearing; and

These matters having been heard on January 25, 1988,

IT IS HEREBY ORDERED that defendant's Motion to Dismiss Complaint to Determine Dischargeability of a Debt is granted; and

That defendant's Motion to Tax Costs is denied.

Dated: 2-4-88.

By the Court:

/s/ William V. Ottenberger
U.S. Bankruptcy Judge
100 N.E. Monroe Street
Room 156, Federal Bldg.
Peoria, Illinois 61602

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(4)

NO. 89-1734

Supreme Court of the
United States

Term: October 1990

Thomas V. Cassidy, Appellant-Petitioner,	]	Petition For Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit
-vs-	]	
United States of America, Commissioner of Internal Revenue, Appellee-Respondent.	]	

RULE 15.7 SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

==========

Appellant-Petitioner,
Pro se.
Thomas V. Cassidy
2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
404/237-0494

SUPPLEMENTAL BRIEF

AS TO:

ONE

QUESTIONS PRESENTED FOR REVIEW

I.

In this case the U.S. court of appeals for the 7th circuit has rendered decisions on the same matter in conflict with decisions of other U.S. courts of appeal of the eleventh (11th) Judicial Circuit in *In Re Burns*, *887 F.2d 1541 (11th Cir. November 13, 1989)* and the tenth (10th) Judicial Circuit in *Roberts v. United States of America, Commissioner of Internal Revenue Service*, 906 F.2d 1440 (10th Cir. June 27, 1990) [*The Appellee-Respondent C.I.R.S. filed no Petition for Rehearing and the mandate issued from the Tenth Circuit Court of Appeals on August 13, 1990*] affirming *94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-*

46-B 1989)] on the issue of the dischargeability of federal tax penalties and deficiencies *[11 U.S.C., sec. 523 (a) (7) (A) (B)]* associated and related to taxing years which preceded the filing of bankruptcy petitions by more than three (3) years.

II.

By virtue of this Court's Rule 15.1 the Respondent herein is deemed to have waived Petitioner's issue presented under QUESTIONS PRESENTED FOR REVIEW, ONE, I, as above set out.

SUPPLEMENTAL BRIEF

TWO

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SUPPLEMENTAL BRIEF

THREE

ADDITIONAL AUTHORITY, STATEMENT OF FACT, ARGUMENT AND SUGGESTIONS TO THE COURT

Subsequent to Petitioner Cassidy timely filing his Petition For Writ Of Cetiorari with the Court on May 7, 1990, the United States Court of Appeals for the Tenth Circuit on June 27, 1990 filed its opinion in ***Roberts v. United States of America, Commissioner of Internal Revenue Service***, 906 F.2d 1440 (10th Cir. June 27, 1990) [*The Appellee-Respondent C.I.R.S. filed no Petition for Rehearing with the 10 Circuit and the mandate issued from the Tenth Circuit Court of Appeals on August 13, 1990*] affirming *94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989)]*. The complete text of the Tenth Circuit Court of Appeals opinion in

the *Roberts* Case, supra, was heretofore on July 17, 1990 furnished to the Court and Respondent by Petitioner Cassidy.

The *Roberts Case*, supra, was cited in Petitioner Cassidy's Petition For Writ of Certiorari at pages 1, 44, 47 and 49 under QUESTIONS PRESENTED FOR REVIEW, number "One", *I., [94 B.R. 707 (Bankr. N.D. Okla., 10 Cir. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989)].*

Thus, as of June 27, 1990 by the affirmance of the United States Tenth (10th) Circuit Court of Appeals of the *Roberts Case*, supra, in conformity with the holding *In Re Burns*, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) [Petition For Writ of Certiorari pages 1, 42, 46 and 47] there now exists between United States Circuits a conflict as to issue QUESTIONS PRESENTED FOR REVIEW, ONE, I., above set out, between the 10th and 11th Circuit Court of Appeals and the 7th

Circuit Court of Appeals in this instant appeal on the same matter as to call for an exercise of this Court's power of supervision.

Petitioner's Petition For Writ of Cetiorari was timely filed herein on May 7, 1990 (Monday) which was fifty-one (51) days before the 10th Circuit Court of Appeals filed it affirming opinion in the *Roberts Case*, supra, and the Respondent's Brief In Opposition was filed on or about July 9, 1990, ostensibly late or pursuant to a very questionable extension in which to file late,\End Note 1. twelve days after the 10th Circuit Court of Appeals filed its affirming opinion in the *Roberts Case*, supra, yet Respondent did not bring to this Court's attention the decision of the 10th Circuit Court of Appeals of June 27, 1990 in the *Roberts Case*, supra, and in fact did not answer

or reply to the *Roberts Case*, supra, anywhere in its Brief In Opposition. This conflict between United States Judicial Circuits is most relevant to this appeal.

By virtue of this Court's Rule 15.1 Respondent is deemed to have waived the issue presented under **QUESTIONS PRESENTED FOR REVIEW, ONE, I.**, above set out:

> ***Any defect of this sort in the proceedings below that does not go to the jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.*** (Emphasis added) ***U.S. Supreme Court rule 15.1.***

The *Roberts Case*, supra, and the *Burns Case*, supra, were fully disclosed and discussed by the parties and the United States 7th Circuit Court of Appeals in the proceedings below and does not go to the jurisdiction of this Court in this appeal.

Other than this document the Petitioner will file no further Court Rule 15.7 supplemental brief, but will file a Court Rule 15.6 Reply to Brief of the United States, Commissioner of Internal Revenue Service in Opposition, prior to the scheduled Justices conference on September 24, 1990.

CONCLUSION

Appellant-Petitioner Thomas V. Cassidy, pro se, requests that the writ issue.

Respectfully submitted,

THOMAS V. CASSIDY, Pro se.
Appellant-Petitioner on
Petition for writ of
certiorari.

2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
404/237-0494

Atlanta, Georgia
September 7, 1990

End Note 1:

Contrary to this Court's rules Respondent's request for extension was in letter-form without a copy to Petitioner, nor proof of service, nor an opportunity for Petitioner to object, especially so in view of the judgment interest running on the judgment appealed from.

Supreme Court, U.S.
SEP 20 1990
JR.

NO. 89-1734

Supreme Court of the
United States

Term: October 1990

Thomas V. Cassidy, Appellant-Petitioner,	]	
	]	Petition For
	]	Writ of
-vs-	]	Certiorari To
	]	The United
United States of America, Commissioner of Internal Revenue, Appellee-Respondent.	]	States Court of Appeals For the Seventh Circuit

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PETITIONER'S RULE 15.6 REPLY TO BRIEF IN OPPOSITION

==========

Appellant-Petitioner,
Pro se.
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404/237-0494

BEST AVAILABLE COPY

PETITIONER'S RULE 15.6 REPLY TO

BRIEF IN OPPOSITION

ONE

POINT & QUESTION PRESENTED

I.

The same Respondent's, as in this present appeal, REPLY BRIEF FOR APPELLANT "Argument" in *Roberts v. United States of America, Commissioner of Internal Revenue Service*, (10th Cir. Case number 89-5145) now cited as 906 F.2d 1440 (10th Cir. June 27 1990) made by the same attorneys as in this action completely belies and contradicts Respondent's present position that "*the court of appeals correctly applied the doctrine of judicial estoppel*" and that no conflict exists between United States Circuit Courts of Appeal and other federal courts as to the judicial application of 11 U.S.C., sec. 523(a)(7)(A)(B).

TWO

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REPLY IN OPPOSITION

ARGUMENT

A.

Petitioner Cassidy here incorporates by reference his September 7, 1990 filed RULE 15.7 SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI.

The same Respondent's, as in this present appeal, REPLY BRIEF FOR APPELLANT "Argument" in *Roberts v. United States of America, Commissioner of Internal Revenue Service*, (10th Cir. Case number 89-5145) now cited as 906 F.2d 1440 (10th Cir. June 27 1990) made by the same attorneys as in this action completely belies and contradicts Respondent's present position that "*the court of appeals correctly applied the doctrine of judicial estoppel*" and that no conflict exists between United States Circuit Courts of Appeal and other federal courts

as to the judicial application of 11 U.S.C., sec. 523(a)(7)(A)(B).

The chief attorneys in this case for the Respondent are Shirley D. Peterson, Assistant Attorney General and Gary D. Gray, Attorney, Department of Justice. The chief attorneys in the Tulsa, Oklahoma and Denver, Colorado U.S. 10th Circuit court of appeals case of ***Roberts v. United States of America, Commissioner of Internal Revenue Service***, (10th Cir. Case number 89-5145) now cited as 906 F.2d 1440 (10th Cir. June 27 1990) for the Respondent were Shirley D. Peterson, Assistant Attorney General and Gary D. Gray, Attorney, Department of Justice.

The agents and officials of the U.S. 10th Circuit court of appeals have supplied Petitioner with a copy of REPLY BRIEF FOR APPELLANT in *Roberts*, supra.

Appellant's there and Respondent's here "Argument" at pages 2, 3 and 4 of its U.S. 10th Circuit court of appeals REPLY BRIEF chimes in totally with Petitioner Cassidy's assertions on this Certiorari, to wit:

> *"The debtors (Roberts) rely on the Eleventh Circuit's recent decision in Burns v. United States, 887 F. 1541 (1989), in arguing that the plain language of the statute {[sic] 11 U.S.C., sec. 523(a)(7)(A)(B)} indicates that Congress intended that even a penalty related to a nondischargeable tax liability will be dischargeable if the underlying liability is more than three-years old when the bankruptcy case is commenced. But the Eleventh Circuit is not the only court to have offered an*

interpretation of Section (a)(7), nor is its interpretation consistent with the interpretation of all other courts that have considered the provision. As we ([sic] U.S.A.,C.I.R.S.) explained in our opening brief (at 12), the Seventh Circuit concluded that 'subsection 523(a)(7)(A) mandates that [tax related] penalties are not dischargeable if the underlying tax with respect to which the penalty was imposed is also nondischargeable,' irrespective of the age of the underlying tax. Cassidy v. Commissioner, 814 F.2d 477, 481 (7th Cir. 1987){Cassidy I}. *[sic] 'However', the Seventh Circuit has recently stated that its analysis in this regard was dicta, since*

the issue was never properly before the court. ***Cassidy v. Commissioner****, 892 F.2d 637 (7th Cir. 1990)*{Cassidy II: This appeal}\End Note #1 *Be that as it may, we submit that the Court's analysis of Section 523 (a)(7) was correct. At all events, inasmuch as it* ***contradicts*** *the* ***Eleventh Circuit****'s interpretation of Section 523 (a)(7),* ***it undercuts the debtors' suggestion that the provision is 'clear'****.*

Other courts have also read the provision in a manner at odds with the court's reading in ***Burns****. . . .The fact that so many courts have discerned a* ***different meaning*** *from that urged by the debtors and adopted by the courts below,* ***belies the*** *debtors'* ***contention that the tortured and convoluted***

language of Section 523(a)(7) is plain and unambiguous." (Emphasis added)

The Constitution of the United States, Article I, Section 8 [4], mandates that Congress *"shall establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."*

11 U.S.C. sec. 523 (a)(7)(A)(B) by virtue of its U.S. circuit courts' interpretation of *In Re Burns*, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) and *Roberts v. U.S.A., Comm. Int. Rev.*, 906 F.2d 1440 (10th Cir. June 27, 1990) on the one hand and *In Re Cassidy*, 892 F.2d 637 (7th Cir. 1990) on the other hand is not uniform; presents a conflict between United States courts of appeals [Rule 10.1(a)] and calls for an exercise of this Court's power of supervision.

B.

A doctrine of "judicial estoppel" as applied, prescripted and memorialized by the U.S. 7th Circuit court of appeals in ***In Re Cassidy***, 892 F.2d 637 (7th Cir. 1990) has no place in the federal judicial system. \End Note #1

Cassidy II is wrong on this point and if not reversed will spawn injustices which in turn will only assault the federal judicial economy by multifarious appeals with the ever attendant free-flowing injustices to litigants throughout the land.

The late United States Supreme Court Justice Potter Stewart wrote: ***"Fairness is what justice really is."***

The U.S. Seventh Circuit court of appeals in canonizing unfairly "judicial estoppel" as it did for the first time in its ninty-four year history has so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

The Court is requested to direct the clerk to issue the writ of certiorari to the U.S. 7th Circuit court of appeals.

Respectfully submitted,

Thomas V. Cassidy,
Pro se, Petitioner
on Certiorari

End Note 1:

The U.S. 7th Circuit court of appeals in *Cassidy II*, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), [This appeal] holds that its holding in *Cassidy I*, Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987), was dicta but then adopts the holding in *Cassidy I* as its holding in *Cassidy II* by affecting a non stare decisis "judicial estoppel" doctrine for the first time in its ninty-four (94) year history, since ordained and established by Congress in 1896, *Cassidy II*, pages 641 and 642, and which "judicial estoppel" doctrine has not been adopted by any of the other twelve United States Judicial Circuits.

Then in its holding in *Cassidy II*, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), the U.S. 7th Circuit court of appeals concedes that Appellant Cassidy [here Petitioner] never has had a hearing on the merits of any kind or that no issues have been "actually litigated" in any of the courts below and that "*a party is not bound to a position it unsuccessfully maintained*" but notwithstanding Petitioner Cassidy is "judicially estopped" and out of court.

As Judge David H. Souter astutely observed recently as to when a case on appeal should be reversed, in his confirmation testimony before the U.S. Senate: "*Whether one of stare decisis or not, it must first be determined if the law of the case is wrong, and if 'yes' or the law of the case would be wrong for the citizens in its application then it must be nipped and reversed before the reliance on the 'bad law' becomes too great or even greater.*" Makes sense!
